

# **ARTICLE 27 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND INTERNET**

**[A STUDY EVALUATING ROLE OF PROSUMERS,  
AUTHORS AND CORPORATIONS IN THE  
INFORMATION SOCIETY]**

**Olli Vilanka**



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**Article 27 of the Universal Declaration of Human Rights and Internet  
– A Study Evaluating Role of Prosumers, Authors and Corporations in  
the Information Society**

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**SUPERVISOR:**

Professor Niklas Bruun of the Hanken Swedish School of Economics

**REVIEWERS:**

Professor Morten Rosenmeier of the University of Copenhagen

Docent Mikko Huuskonen of the Lappeenranta University of Technology.

**OPPONENT:**

Professor Marianne Levin of the University of Stockholm

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This dissertation evaluates position of prosumers, authors and corporations in the information society especially from the viewpoint of Article 27 of the Universal Declaration of Human Rights. Prosumers are understood as private natural persons who do not use content for commercial purposes whereas authors are understood as the traditional *droit d'auteur* copyright theory postulates. It has been argued that role of legal persons, corporations, has increased as it pertains to copyright. Therefore also their position shall be evaluated and compared to rights of authors and especially prosumers from fundamental rights perspective. The book also evaluates collective administration of rights, position of intermediaries and some other topics. As fundamental rights acknowledged protection to prosumers and authors but do not in principle extend their scope to corporations, the book argues that alternative manners but exclusive rights should be considered to secure rights of prosumers and authors in the information society.

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Sääksmäki, July 23rd of 2014, on very hot and sunny day.  
Olli Vilanka

## ABSTRACT

This dissertation is an article based dissertation evaluating position of prosumers, authors and corporations in the information society especially from the viewpoint of Article 27 of the Universal Declaration of Human Rights (UDHR). Prosumers are understood as private natural persons who use content protected by copyright for non-commercial purposes. Similarly authors are understood, following the traditional *droit d'auteur* copyright theory, as individual natural persons creating content protected by copyright. As it has been argued that role of legal persons, or corporations, has increased as it comes to administering copyright, also their position shall be evaluated and compared to rights of authors and especially prosumers.

Article 27 of the Universal Declaration of Human Rights, similarly as copyright theory based on exclusive rights, postulates that content should be both created and used. However, significant amounts of illegal uses of content on the Internet constantly take place. Thus the main aim is to evaluate whether something prevents use of content on the Internet and to what extent it may be justified from the viewpoint of Article 27 of the UDHR. Preventing or denying use should not be in the interest of anyone.

In this respect the book analyses article 27 of the UDHR suggesting that the right to science and culture as enshrined in its subsection 1 allows use of content. Although subsection 2 of the article 27 of the UDHR does not grant exclusive rights to authors, rights of authors shall be evaluated from the viewpoint that exclusive rights are being applied. In practice this means evaluating possibilities to administer use of content through exclusive rights and in this respect power relations between prosumers, authors and legal persons. Collective administration of rights, position of intermediaries and applicability of platform fees shall also be examined.

Main method for evaluation is legal dogmatic method from fundamental right perspective. It could also be described as a traditional legal doctrine approach describing and systematizing legal sources and arguments containing philosophical insight. Regarding systemizing and interpreting norms, Dworkin's theory of rules and principles shall be applied. The book has also an interdisciplinary approach as it compares individualistic *droit d'auteur* copyright theory to basics tenet from the field of communicational studies.

The findings indicate that not only prosumers, but also authors seem to have small role as it comes to administering use of content. Instead role of legal persons seems to be more significant. As fundamental rights protect natural persons such as prosumers and authors, but in principle do not extend their scope to legal persons, and especially to larger corporations, rigorous and strict reading of copyright law



often causes challenges from the viewpoint of fundamental rights. Thus the book argues that alternative manners but exclusive rights should be considered in order to secure rights of prosumers and authors as it comes to use of content on the Internet. Consequently some legal political suggestions shall be made.

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# 1 INTRODUCTION

## 1.1. AIM OF THE STUDY

It has been argued that communication is at the core of information society. Possibilities to communicate content and information on digital devices have seen an unprecedented increase, especially in open networks such as the Internet.<sup>1</sup> Hence, residents of the developed world have the means to easily and freely obtain and share existing knowledge in its different forms. This simple fact makes all individuals both producers and users of content, i.e. *prosumers* who are understood in this book as private natural persons acting for non-commercial purposes.<sup>2</sup>

Article 27 of the Universal Declaration of Human Rights (hereafter UDHR) and Article 15 of the International Covenant on Economic, Social and Cultural Rights (hereafter ICESCR)<sup>3</sup> also provide a right for everyone to use information and content in different forms. Article 27(1) of the UDHR states that “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits” whereas Article 15(1) (a)(b) correspondingly provides everyone a right to “(a) to take part in cultural life” and “(b) to enjoy the benefits of scientific progress and its applications”.<sup>4</sup> The rights granted in Article 27(1) of the UDHR and Article 15 1(a) of the ICESCR are understood in this dissertation to be identical and shall therefore be referred to

1 Ideologically one has often referred to Marshall McLuhan’s concept of the “Global village” where physical distance does not constitute real hindrance to the real-time communicative activities of people. See e.g. Marshall McLuhan, *Ihmisen uudet ulottuvuudet*, Werner Söderström Osakeyhtiö, Porvoo, 1968. A translation from Marshall McLuhan’s *Understanding Media: The Extensions of Man* (First Ed. McGraw Hill, New York, 1964). See also Wikipedia’s definition for Global village: Available at: [http://en.wikipedia.org/wiki/Global\\_village\\_%28term%29](http://en.wikipedia.org/wiki/Global_village_%28term%29). See also Frank Webster, *Theories of the Information Society*, third edition, Routledge 2006 (hereafter Webster), p. 8 ff and e.g. Antti Hautamäki (eds.), *Suomi teollisen ja tietoyhteiskunnan murroksessa, Tietoyhteiskunnan sosiaaliset ja yhteiskunnalliset vaikutukset*, A publication of SITRA (154), Helsinki 1996, available at: <http://www.sitra.fi/julkaisut/tietoyhteiskunta/sitra154.pdf>.

2 Regarding prosumers see e.g. Alvin Toffler, *The Third Wave*, Pan Books Ltd 1981, p. 275 – 295, David Ticoll, Alex Lowy and Ravi Kalakota, *Joined at the Bit: The Emergence of the e-Business Community*, published in Don Tapscott, Alex Lowy and David Ticoll, *Blueprint to the Digital Economy*, McGraw-Hill 1998, p. 24 and Kari Lietsala-Esa Sirkkunen, *Social Media, Introduction to the Tools and Processes of Participatory Economy*, Tampere 2008, p. 18 (available at, <http://tampub.uta.fi/bitstream/handle/10024/65560/978-951-44-7320-3.pdf?sequence=1>), Frank Webster, *Theories of the Information Society*, third edition, Routledge 2006, p. 17 – 19 and Seppo Sisättö, *Internet taskussa, Mobiiliin sähköiseen yhteiskuntaan*, Införviestintä Oy, Tampere 2004, p. 15 ff. Use of content by private persons have also been acknowledged also in the official documents as e.g. in the statement of the Constitutional Law Committee (7/2005) of Finland. Regarding legal literature see e.g. Tuomas Mylly, *Tekijänoikeuden ideologiat ja myytit*, Lakimies 2/2004, p. 241 –242.

3 Thus although the name of the book refers only to the Article 27 of the UDHR, corresponding references to Article 15 of the ICESCR shall be made.

4 See The Universal Declaration of Human rights as adopted by the United Nations General Assembly 10 December 1948 and International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI), of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

as *the right to science and culture*.<sup>5</sup> As later shall be explained in more detail, the rarely quoted right to science and culture provides exceptional possibilities to share and receive – or in terms of copyright use – content on the Internet.

However, it is commonly known among copyright researchers that the right to science and culture has been consistently presented side by side and as an opposing right with a provision providing protection for authors.<sup>6</sup> Indeed, Article 27(2) of the UDHR states that “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Similarly, Article 15(1)(c) of the ICESCR recognizes the right to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” The right granted in these articles shall be referred in this book as a right protecting *essential economic interests of authors* or simply the *rights of authors*.<sup>7</sup>

A functional system conforming to the UDHR must simultaneously fulfil both the right to science and culture and the rights of authors. However, it is questionable whether this is the case in Western countries. “Internet piracy” is an often -used expression describing the illegal use of copyrighted content on the Internet. However, “piracy” on the Internet is already itself a paradoxical concept as copyright does not aim to create “piracy” or prevent use but on the contrary it aims to *enable use* of copyrighted content. Consequently, massive amounts of illegal users imply that copyright does not function as intended. Therefore, this dissertation evaluates possibilities to fulfil the right to science and culture and rights of authors as provided by Article 27 of the UDHR and 15 of the ICESCR.

An attempt has been made to write this book in a way that is comprehensible to all interested parties. Given the focus of this book on the evaluation of fundamental rights, the reader must be familiar with traditional fundamental rights analysis. Therefore, this introduction may serve as a short primer for current fundamental rights analysis. Some readers may also intuitively feel that to the extent to which the relationship between right holders and prosumers is evaluated in this book is purely academic and has no practical relevance because one has never issued licenses to natural persons who have traditionally been considered as end-users. However, such intuition is faulty given that prosumers are not end-users, but instead *users*. The history, normative background and practice of copyright law have specifically concentrated on evaluating the relationship between right holders and users.<sup>8</sup> Millions of prosumers using content illegally (“internet piracy”) and millions

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5 The term has been adopted from Lea Shaver’s article “The Right to Science and Culture”. See Shaver, Lea Bishop, The Right to Science and Culture (March 6, 2009). Wisconsin Law Review, Vol. 2010 (hereafter Shaver), p. 154. Available at SSRN: <http://ssrn.com/abstract=1354788> or <http://dx.doi.org/10.2139/ssrn.1354788>.

6 See e.g. Shaver, p. 134 – 136 and Pirkko-Liisa Haarmann

7 It should be mentioned that rights of authors are evaluated in this book as economic rights and consequently the book does not evaluate so-called moral rights of authors.

8 No right to “end-use” either exists and consequently no corresponding licenses for “end-using” could be granted. It could also be mentioned that Article 3(i) in a proposal for a Directive of the European Parliament and of the Council on collective



of freer licenses are concrete proof that there is also the will to use and license content by authors and prosumers. Moreover, given that both the fundamental rights and continental *droit d'auteur* copyright theories view natural persons at the core of fundamental rights analysis, evaluating the relationship between authors and prosumers from the fundamental rights perspective may be justified. In an information society, the role of natural persons as users with regard to the field of copyright has been emphasized.<sup>9</sup>

This evaluation focuses on the use of content on the Internet, which is understood as an open network.<sup>10</sup> Open networks are perceived to be networks theoretically allowing for free participation in order to obtain and share information in different forms without technical restrictions. As it has been argued that the role of legal persons (often referred to as corporations) in copyright has become more profound, relationships between authors and legal persons, including relationships between prosumers and legal persons, shall be considered herein. However, because legal persons in principle fall outside fundamental rights protection, analysis in the book does not directly concern relationships between legal persons. Finally, it should be mentioned that some of the interpretations this book provides may be somewhat surprising, given that very little attention has been previously given to the right to science and culture as enshrined in Article 27(1) of the UDHR. For example, the right to use content is rarely brought up in the literature despite the fact that Article 27(1) of the UDHR specifically provides it. Herein, fundamental rights and Article 27(1) of the UDHR are considered alongside more traditional copyright discussion to add depth and relevance to current copyright discussion.

## 1.2. STRUCTURE

Analysis of the right to science and culture and authors' rights is first conducted from the viewpoint of fundamental rights.<sup>11</sup> Thus, this book first evaluates basic tenets

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management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, Brussels, 11.7.2012, COM(2012) 372 final (hereafter Directive on Collectives) separates natural person as a user and a consumer by stating that "user" means any natural person or legal entity who is carrying out acts subject to the authorisation of rightholders, the remuneration of right holders or the payment of compensation to right holders and who is not acting in the capacity of a consumer."

9 It should be remembered we all as natural persons have always easily been creators of content as e.g. even a drawing of a child may be protected by copyright. However, new technologies have emphasized our role also as users of content in a manner that has not been possible before.

10 Also EU Commissions Declaration on Net Neutrality emphasises "open and neutral character of the Internet". See last page of the Directive 2009/140/EC of the European Parliament and of the Council, of 25 November 2009, amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

11 See also Prof. Laurence R. Helfer, *Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited*, published in *Collective Management of Copyright and Related Rights*, Second edition, edited by Daniel Gervais. Kluwer Law International 2010 (hereafter Helfer), p. 86: "The key to understanding this [human rights] framework is to identify the purposes of recognizing authors' moral and material interests as human rights. According to the Committee [in

related to fundamental rights in general, the right to science and culture and rights of authors as fundamental rights in chapters 2 – 4. It also compares economic rights of authors to basic research results from the field of communication as copyright is often connected to communication. In this respect an attempt is made herein to find alternative manners to perceive the economic rights of authors, especially the right of reproduction, in a modern information society.<sup>12</sup> In chapter 5, the right to science and culture shall be compared with the rights of authors. The rights of authors shall be evaluated in the light of individualistic *droit d'auteur* copyright theory and especially its application as a property right, although the referred articles in the UDHR and the ICESCR do not grant exclusive rights to authors. This is because copyright is often perceived as a property right in Western countries. However, if property right is applied to secure essential economic rights of authors, the authors themselves should be able to conclude transactions with prosumers. If concluding transactions is not possible, authors cannot expect to obtain compensations for use of their property. For this reason, chapter 6 evaluates whether it is plausible to expect prosumers and authors as natural persons to conclude individual transactions with each other as it pertains to use of content on the Internet. This was also evaluated in the second article of this book, “Challenges Related to Applicability of Exclusive Rights on the Internet – Platform fees as an Alternative?”<sup>13</sup> The article concluded that authors and prosumers as natural persons are often not able or interested in concluding direct individual transactions with each other.

This finding indicated that claims arguing that copyright is primarily used for protecting private business interests instead of individual authors are plausible.<sup>14</sup> This would be questionable if legal persons do not enjoy fundamental rights protection. Consequently, chapter 7 focuses on evaluating the role of legal persons as right holders from the viewpoint of fundamental rights, especially in relation to the right to science and culture. Short references are also made to such fundamental

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General Comment 17], such rights serve two essential functions. First, they ‘safeguard the personal link between authors and their creations and between people or other groups and their collective cultural heritage’. Second, they protect ‘basic material interests which are necessary to enable authors to enjoy an adequate standard of living’. ... Stated differently, once a country guarantees creators these two core rights – one moral and the other material – any additional intellectual property protections the country provides ‘must be balanced with the others rights recognized in the Covenant’, and must give ‘due consideration’ to ‘the public interest in enjoying broad access to authors’ productions’.”

12 See Olli Vilanka, Communicative Approach to Copyright, published in Journal of International Commercial Law and Technology (JICLT), vol 9, No 1 (2014), available at: <http://www.jiclt.com/index.php/jiclt/article/view/200>.

13 See Olli Vilanka, Challenges Related to Applicability of Exclusive Rights on the Internet – Platform fees as an Alternative, published in JFT 3/2013, p. 1 – 34.

14 Regarding claims of industry influence on copyright see e.g. Tuomas Mylly, Intellectual Property and European Economic Constitutional Law, The Trouble with Private Informational Power. Vaajakoski 2009, passim (hereafter Mylly) and Lawrence Lessig, Free Culture, How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity, The Penguin Press, New York 2004, p.9, and passim. Also Gervais has stated that copyright is primarily for “professionals” to “organize markets for certain types of works of art or the intellect.” See Daniel Gervais, Collective Management of Copyright: Theory and Practice in the Digital Age, published in Collective Management of Copyright and Related Rights, second edition, (eds.) Daniel Gervais, Kluwer Law International BV 2010 (hereafter Gervais 2010), p. 10 - 15. See also Jukka Kempainen, Digitaaliongelman, Kirjoitus oikeudesta ja ympäristöstä, Lappeenranta teknillinen yliopisto, Digipaino 2006, p. 59.

rights as the right to privacy and to the right to life, liberty and security of person, due to the possibility of criminal sanction. The chapter concludes that it is challenging to extend fundamental rights protection to legal persons.

Chapter 8 follows by evaluating the position of intermediaries.<sup>15</sup> The analysis focuses on evaluating whether intermediaries could ask permissions on behalf of prosumers to use content. It was concluded that this would be challenging in an open network as intermediaries should ask permissions from right holders prior to use. Indeed, it would be difficult for an intermediary to predict what content a certain prosumer is going to use in an open network.

Chapter 9 examines whether collective administration of content could provide a functional solution as it pertains to the use of content on the Internet. Consequently, the chapter evaluates collective administration from the viewpoint of fundamental rights. The basis for the evaluation was conducted in the article, “Rough Justice or Zero Tolerance? – Reassessing the Nature of Copyright in Light of Collective Licensing (Part I)”, which critically examined the nature of collective administration of content as opposed to individual administration.<sup>16</sup> The chapter finds it challenging to argue that collective administration could be identified with individual administration and consequently it was difficult to extend fundamental rights protection to collective administration.

Despite the theoretical problems related to collective administration, chapter 10 evaluates the ability of Nordic collective licenses to provide a functional solution for securing rights as provided by Article 27 of the UDHR and 15 of the ICESCR. The background for the chapter was evaluated in an article “Nordic Extended Collective Licensing – a Solution for Educational and Scientific Users and Prosumers to Copy and Make Content Available on the Internet”. This article evaluated possibilities of collective administration and especially collective licensing to enable use of content on the Internet.<sup>17</sup> It was found that licenses offered to prosumers provide only limited possibilities to use content on the Internet. This indicates that collective licenses do not provide comprehensive solutions as it pertains to the right to science and culture as provided by Article 27 of the UDHR and 15 of the ICESCR.

Finally, chapter 11 evaluates whether platform fees could provide solutions to secure rights granted in Article 27 of the UDHR and 15 of the ICESCR. It was concluded that a platform fee system would not be as challenging from the viewpoint of fundamental rights as a system based on exclusive rights. It was also difficult to

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15 Author of this book has also published a book examining linking on the Internet. See Olli Vilanka, *Linkittäminen, tekijänoikeus ja verkkojulkaiseminen*, Lakimies 4/2006, p. 608 – 627. However, it shall not be annexed to be part of book as such as it has been written in Finnish.

16 Olli Vilanka, *Rough Justice or Zero Tolerance? – Reassessing the Nature of Copyright in Light of Collective Licensing (Part I)*, published in in “In Search of New IP Regimes”, a publication of IPR University Center 2010 (hereafter Vilanka 2010).

17 Olli Vilanka, *Nordic Extended Collective Licensing – a Solution for Educational and Scientific Users and Prosumers to Copy and Make Content Available on the Internet*, published in *Business Law Forum* 2012, Vantaa 2012. The article formed a sequel (“Part II”) in relation to the third article.

find justifications preventing the use of platform fees if they are able to secure both the right to science and culture and rights of authors.

The book concludes by considering it problematic to fulfil the right to science and culture and author's right through exclusive rights as it pertains to use of content on the Internet. Prosumers and authors as natural persons simply do not seem to be interested in concluding individual transactions with each other. Concluding such transactions is challenging and often even impossible. Conversely, as it is challenging to extend fundamental rights protection to legal persons, it becomes problematic to protect their interest in relation to the fundamental rights of prosumers. For this reason, it is recommended that measures other than exclusive rights should be applied to protecting the right to science and culture and rights of authors on the Internet.

### 1.3. MAIN SOURCES

This book refers to *fundamental rights* as an umbrella term for human and constitutional rights.<sup>18</sup> In more detail, the book regards the Universal Declaration of Human Rights<sup>19</sup> and International Covenant on Economic, Social and Cultural Rights<sup>20</sup> as main sources. Although several states may have chosen to ratify it as part of their legislation, the UDHR does not bind states per se. However, nations often implement international treaties to their constitutional law since "domestic bills of rights and international human rights law perform the same basic function of stating limits on what governments may do to people within their jurisdictions."<sup>21</sup> ICESCR also creates enforceable rights claims against those countries that have signed and ratified the treaty.<sup>22</sup> As of July 2011 ICESCR had 160 signatories.

Relevant legal literature, especially "General Comments" provided by the Committee on the Economic, Social and Cultural Rights shall be used when interpreting the referred instruments. The Committee on the Economic, Social and Cultural Rights is a body of eighteen human rights experts monitoring the

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18 Thus in this book "fundamental rights" refer to all rights, whether civil, political, economic, social or environmental rights, which has been defined as "fundamental rights" in the International human rights conventions. See similarly Tuomas Ojanen, *The European Way, The Structure of National Court Obligation under EC Law*. A Doctoral Dissertation. Saarijärvi 1998 (hereafter Ojanen), p. 97, footnote, 4: "The terms 'fundamental rights' and 'human rights' are so vast in their implications that it is hard to define them in words."

19 The Universal Declaration of Human Rights as adopted by the United Nations General Assembly 10 December 1948.

20 International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976 in accordance with article 27.

21 See Stephen Gardbaum, *Human Rights as International Constitutional Rights*, *The European Journal of International Law* Vol. 19 no. 4 © EJIL 2008, p.750.

22 Shaver, p. 176 – 177 and Shaver, Lea Bishop and Sganga, Caterina, *The Right to Take Part in Cultural Life: On Copyright and Human Rights* (July 21, 2009). *Wisconsin International Law Journal*, Vol. 27, 2009 (hereafter Shaver and Sganga), p. 639. Available at SSRN: <http://ssrn.com/abstract=1437319>.

implementation of the International Covenant on Economic, Social and Cultural Rights.<sup>23</sup> General Comments are non-binding documents, but give guidance on how the referred fundamental rights should be interpreted. Furthermore, European Convention on Human Rights (1950, hereafter ECHR)<sup>24</sup> also provides a source for rights. Indeed, the European Court of Justice (ECJ) has stated that it ensures the respect of fundamental human rights and uses ECHR as a major source of fundamental rights.<sup>25</sup> In its *Stauder* and *Internationale Handelsgesellschaft* rulings the ECJ also reaffirmed the primacy of European Community law over member state laws.<sup>26</sup> As the ECJ has not eliminated the effects of national constitutional laws but acknowledges them as inspirations of “the constitutional traditions common to the Member States and “guidelines”,<sup>27</sup> references to appropriate paragraphs of the Constitution of Finland (11.6.1999/731, hereafter CF) and its preliminary material shall also be made herein.<sup>28</sup> In this respect, the book has a “Finnish flavor”. However, Finland has widely ratified the referred international conventions (e.g. the ICESCR in 1976) to its legislation and consequently the analysis should provide guidelines also for readers from other countries.<sup>29</sup>

## 1.4. METHODOLOGY

The main method of this book is legal dogmatic, especially from a fundamental right perspective.<sup>30</sup> It could also be described as a traditional legal doctrine describing and systematizing legal sources and arguments, which also contains philosophical insight and tools.<sup>31</sup>

As it pertains to the systemization and interpretation of fundamental rights, current theory on legal norms as rules, principles and policies shall be applied to

23 Office of the High Commissioner for Human Rights, The Nature of States parties obligations (Art. 2, par.1):12/14/1990, fifth session, CESCR General Comment 3 (hereafter General Comment No 3) and Committee on Economic, Social and Cultural Rights, General Comment No.17 (2005) (hereafter General Comment No. 17). See also *Helper*, p. 77.

24 The European Convention on Human Rights, Rome 4, November 1950 and its five protocols.

25 See Case C-29/69 *Stauder v City of Ulm* [1969] ECR 419 paragraph 7 where the Court states that fundamental rights are “enshrined in the general principles of Community law.” See also *Ojanen*, p. 107.

26 See Case C-29/69 *Stauder v City of Ulm* [1969] ECR 419 and Case C-11/70 *Internationale Handelsgesellschaft BmbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

27 See Case C-4/73 *Nold v Commission* [1974] ECR 491 and *Ojanen*, p. 97 ff.

28 See The Constitution of Finland, 11 June 1999 (731/1999, amendments up to 1112/2011 included), available (in English) at: <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>.

29 See e.g. Martin *Scheinin*, Ihmisoikeudet Suomen oikeudessa, a doctoral dissertation, Jyväskylä 1991 (hereafter *Scheinin*), p. 8-9. For example, the Constitution of Finland encompasses the rights provided by the Universal Declaration of Human Rights (adopted by the United Nations General Assembly on 10 December 1948) although it is not a treaty, which can be ratified as such. See e.g. Martin *Scheinin*, Yhteiset ihmisoikeutemme, Suomen YK-liitto ry, Helsinki 1998, p. 6 and 54, available at: [http://www.om.fi/uploads/54bgu60narbnv\\_1.pdf](http://www.om.fi/uploads/54bgu60narbnv_1.pdf).

30 Regarding methodologies in general see Ari *Hirvonen*, Mitkä metodit? Opas oikeustieteen metodologiaan. Helsinki 2011 (hereafter *Hirvonen*).

31 Hannu Tapani *Klami*, Comparative Law and Legal Concepts – The Methods and Limits of Comparative Law and its Connection with Legal Theory, Vammala 1981, p. 93.

evaluate the right to science and culture to rights of authors.<sup>32</sup> Also other literature developing the rule/principle approach shall be used.<sup>33</sup>

In Dworkin's division, legal *rules* apply in an all-or-nothing fashion.<sup>34</sup> This means that a rule either applies to a certain case or does not. If it does, it must be followed and if two rules conflict, one of them must be invalid. In such cases of conflicting rules, resolutions are based on maxims such as *lex posterior*, *lex superior* or other type of doctrine for source of law.<sup>35</sup>

*Principles*, such as the principle that no-one should profit from one's wrongs, are norms that officials have to take into account in their decision making. They have a dimension that rules do not, a "dimension of weight or importance" and they may pull to different directions.<sup>36</sup> If principles intersect, their relative weight must be taken into consideration in the decision making.<sup>37</sup>

Weighing different principles cannot be exact.<sup>38</sup> Here, thoughts of Dworkin have often been compared to those of Robert *Alexy*. Alexy sees principles as "optimization commands". This means that principles set an obligation to optimize applicability of both of the intersecting principles. His idea is that conflicting principles supplement each other and are applied as widely as possible, although an order of priority is formed between them.<sup>39</sup>

As it pertains to the relationship between rules and principles, Dworkin does not consider rules and principles as being in conflict. For him, rules reflect principles and rules represent "a kind of compromise amongst competing principles". In situations when the relationship between rules and principles should be evaluated (often referred to as "hard cases"), courts weigh the principles maintaining a certain rule to a set of principles, which call to overruling the rule at hand. Dworkin also separates *policies* from principles. Where principles establish individual rights, a policy sets a collective goal to be reached, e.g. an improvement in some economic, political, or social feature of the community.<sup>40</sup>

32 This follows Ronald Dworkin's well known analysis from his book *Taking Rights Seriously*. See Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press 1977, 1978 (hereafter Dworkin), p.22 ff. It should be noted that Dworkin's theory openly resembles liberal political theories, which base on classical liberty rights. Hannu Tolonen sees Dworkin's theory as a form of liberal political theory, which has its core at classical liberty rights. See H. Tolonen, *Säännöt, periaatteet ja tavoitteet: Oikeuden, moraalin ja politiikan suhteesta. Oikeustiede – Jurisprudentia XXII 1989* (hereafter Tolonen), p. 354 ff.

33 See e.g. Juha Pöyhönen, *Sopimusoikeuden järjestelmä ja sopimusten sovittelu*, a doctoral dissertation. Vammala 1988 (hereafter Pöyhönen), p. 13 – 78. Robert Alexy, *Oikeusjärjestelmä, oikeusperiaate ja käytännöllinen järki*. Lakimies 1989 (hereafter Alexy), p. 620 – 621 and Scheinin, p. 29 ff. See also, Tarmo Miettinen, *Tieteen vapaus*. Jyväskylä 2001 (hereafter Miettinen), p. 67 ff and Pekka Lämsineva, *Perusoikeudet ja varallisuussuhteet*, a doctoral dissertation. Jyväskylä 2002 (hereafter Lämsineva), p. 92.

34 Dworkin, p. 24. See also Scheinin, p. 30.

35 See e.g. Pöyhönen, p. 24 and Scheinin, p. 31.

36 Dworkin, p. 26 – 28.

37 Dworkin, p. 26 – 28. It should be mentioned that rules do not have dimension of weight or importance as they either apply or not.

38 Dworkin, p. 26 and 77 – 78. It is also said that principles are confirmed in individual cases only when a "hard case" is solved by applying a principle (or several principles). Pöyhönen, p. 31.

39 Alexy, p. 627. See also Scheinin, p. 29 ff.

40 Dworkin, p. 90. Principles, which establish an individual right, have primacy over policies, which establish a collective goal. Dworkin, p. 22.

Consequently, when evaluating the scope of fundamental rights, it is understood that all human and constitutional rights have their strongly protected core areas.<sup>41</sup> Further from the core area are principles, which are still protected as human and/or constitutional rights. Policies are not protected by human or constitutional rights, but they may be recognized in normal laws.<sup>42</sup> If rules conflict, only one of them may be applicable. If principles conflict, one should evaluate their weight and importance in the case at hand. If a rule and a principle are in conflict, one should evaluate the principles behind the rule and the principles drawing to another direction and then optimize their applicability in order to decide which principles apply (i.e. whether the principles(s) behind the rule is/are overridden by other principles). In the end, it is a question of diverse objectives and values protected as fundamental rights.<sup>43</sup> The method is commonly used in fundamental rights analysis and it should also be taken into consideration when evaluating the possible limitations of fundamental rights.<sup>44</sup> It also enables evaluating the case -by -case relationship between fundamental rights.<sup>45</sup>

At this point it should be mentioned that this book does not apply maxims such as *lex posterior* or *lex superior* in order to solve possible conflicts between copyright and other rights. The reason for this is that no specific paragraphs or laws have been enacted as it pertains to the right to science and culture. In other words, so far the right to science and culture is merely maintained in the Article 27(1) of the UDHR and Article 15 of the ICESCR. Thus, it is not possible to use maxims such as *lex posterior* or *lex superior* to compare concrete norms constituting the right to science and culture e.g. to specific paragraphs in copyright laws. For this reason, the right to science and culture is compared to author's rights through basic fundamental rights doctrine.

41 See also Jerome J. Shestack, *The Philosophic Foundations of Human Rights*. *Human Rights Quarterly* 20 (1998), p. 215: "The common theme emerging from a huge family of [modern human rights] theories is that a minimum absolute or core postulate of any just and universal system of rights must include some recognition of the value of individual freedom of autonomy."

42 It is in the end philosophical question how distinctions between rules and principles are or should be made. See in more detail, *Pöyhönen*, p. 20 – 29. See similarly as here Riku *Neuvonen*, *Sananvapaus, joukkoviestintä ja sääntely, tutkimus sananvapauden toteutumisesta joukkoviestinnän sääntelyssä ja joukkoviestinnän oikeudellisen sääntelyn suhteesta joukkoviestinnän sääntelyyn*, licentiate's degree. Helsinki 2005, p. 16.

43 See similarly also Tuomas *Mylly*, *Intellectual Property and Fundamental Rights: Do They Interoperate in Bruun*, Niklas (ed.): *Intellectual Property Beyond Rights*, WSOY, 2005, p. 187.

44 For example, General Comments of the Committee on Economic, Social and Cultural Rights separate protected core areas of different fundamental rights. Available at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>. The method is also commonly used e.g. by the Constitutional Committee of Finland.

45 It could be mentioned that also theory of *Karhu* emphasises role of fundamental rights and situational sensitivity in decision making in order to avoid problems related of formal/casuistic reading of law. Juha *Pöyhönen* (nowadays *Karhu*), *Uusi Varallisuus oikeus*, Helsinki 2000 (hereafter *Pöyhönen* 2000), p. 191 – 193.

Finally, it should be mentioned that the book also evaluates the relationship of copyright to communicational/information sciences and the Internet.<sup>46</sup> This is done because copyright has been often connected to communication and applying the concept of reproduction to the Internet has faced certain challenges. Consequently, chapter 4 compares authors' economic rights to basics of communicational sciences as explained by *Wiio* and *C.E. Shannon*. In this respect, one could say that it belongs under "communication law".<sup>47</sup>

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<sup>46</sup> In more detail see *Hirvonen*, p. 28 ff.

<sup>47</sup> In Finland copyright has also been connected to field of "communication law" e.g. *Kulla (et al)*, *Viestintäoikeus* ["Communication law in English, if literally translated"], Vantaa 2002. See also Päivi *Tiilikka*, Jukka *Siro* (eds), *Kirjoituksia viestintäoikeudesta*, Helsinki 2010 and Marika *Siiki*'s article, *Tekijänoikeuksiin ja verkkoviestintään liittyvät rikokset Helsingin hovioikeuden viimeaikaisessa oikeuskäytännössä*, p. 95 ff.



## 2 APPLIED BASIC CONCEPTIONS RELATED TO FUNDAMENTAL RIGHTS ANALYSIS

### 2.1. RECIPROCAL NATURE OF FUNDAMENTAL RIGHTS

As explained, the right to science and culture and rights of authors have historically been presented as opposing rights. This conflict of rights is congruent with the idea that rights, and especially fundamental rights, are in a reciprocal relationship with each other. Often, the principle of reciprocity is derived from Immanuel *Kant's* idea of legal rights and obligations: when a person calls upon his/her rights against another, for reasons of consistency, s/he has to recognize that the other is like s/he is. Thus, thorough this recognition a person has to also accept that the other person may have similar rights that should be honored. By recognizing another's rights, corresponding obligations against those rights appear always when a person invokes his/her own rights.<sup>48</sup>

Mylly has described this interdependent nature of rights in a similar way: "Rights should not be conceived as atomistic, but intersubjective in their character. As elements of the legal order, they are based on mutual recognition and emerge co-originally with the law positively creating them. The intersubjectivity of rights connotes that it is possible to construct all private relations, and hence all private law relations, from the perspective of fundamental rights. Taking one right as far as it can go brings it likely into conflict with other rights and restricts the dialogue between rights, necessary in pluralistic societies. Hence, individuals must accept that the perception of their own rights requires that they honour the rights of others."<sup>49</sup>

As it pertains to the right to science and culture and right protecting essential economic interests of authors, the reciprocal nature may be read from paragraph 47 of the *General Comment 21* of the Committee on Economic, Social and Cultural

<sup>48</sup> Pöyhönen 2000, p. 72. See also Raimo Siltala, Perusoikeusjärjestelmän sisäisestä logiikasta. Lakimies 4/2001, p. 737.

<sup>49</sup> See Mylly, p. 181. See similarly also Christophe Geiger, The Constitutional Dimension of Intellectual Property, published in Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights, Paul L. C. Torremans (eds) (hereafter Geiger), p. 104 – 107. Regarding possible fundamental rights collisions and consequent limitations in Finland see e.g. Veli-Pekka Viljanen, Perusoikeuksien rajoittaminen, published in Perusoikeudet, Hallberg (et al), Helsinki 2011, p. 139.

Rights. It states that “Given the interrelationship between the rights set out in article 15 of the Covenant [ICESCR]..., the full realization of the right of everyone to take part in cultural life also requires the adoption of steps necessary for the conservation, development and dissemination of science and culture, as well as steps to ensure respect for the freedom indispensable to scientific research and creative activity, in accordance with paragraphs 2 and 3 respectively, of article 15.”<sup>50</sup> Similarly *General Comment 17* of the Committee on Economic, Social and Cultural Rights states that the right to material interests resulting from creative works as provided by Article 15 1 (c) of the ICESCR [i.e. author’s rights] is “intrinsically linked” and “mutually reinforcing and reciprocally limitative” to right to culture and science as provided in Article 15 1(a)(b) (and paragraph 15.3 of the ICESCR, which obligates states to “respect the freedom indispensable for scientific research and creative activity”).<sup>51</sup> Also property right as a fundamental right is connected to other fundamental rights and should not be evaluated in isolation.<sup>52</sup> Keeping in mind the reciprocal relationship of rights subjects and aim of fundamental rights may be evaluated.

## 2.2. AIM AND SUBJECTS OF FUNDAMENTAL RIGHTS PROTECTION

It is often said that only *particularly important rights are protected as fundamental*. The aim of these fundamental rights is to set a certain *minimum standard for protection*. This means in the words of the high commissioner for human rights:

“on the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic

<sup>50</sup> See United Nations, Committee on Economic, Social and Cultural Rights, Forty-third session, 2 – 20 November 2009, General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights (hereafter General Comment 21), paragraph 47 and e.g. paragraphs 2 and 9, which also acknowledge the relationship between rights of authors and users.

<sup>51</sup> See United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, Thirty-fifth session 7-25 November 2005, General Comment No. 17: The Right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, paragraph (hereafter General Comment 17), paragraph 4.

<sup>52</sup> Pekka Lämsineva, Omaisuuuden suoja (PL 15 §), published in Perusoikeudet, Hallberg (et al), Helsinki 2011 (hereafter Lämsineva 2011), p. 555 – 556.

forms of education is, *prima facie* failing to discharge its obligations under the Covenant.”<sup>53</sup>

Therefore, although fundamental rights ought to equally protect everybody, it is understood in this book that only the *essential rights* (“essential foodstuff, of essential primary health care, of basic shelter and housing ...”) are to be protected by human and similar constitutional rights. It is difficult to see why this should not apply also to the right to science and culture and rights of authors.<sup>54</sup> However, it should be mentioned that one does not need to see the standard covered by fundamental rights as a definitive. For example, according to *Ojanen* ECHR sets minimum standards for the protection of human rights and consequently human rights could be seen both more stringent and more extensive as afforded in the ECHR.<sup>55</sup>

As it pertains to *subjects* of fundamental rights protection, governments are obligated to secure a certain minimum standard of protection for *natural persons*. The approach is clear from a historical viewpoint as after the Second World War it was generally accepted that all humans have certain minimum universal rights<sup>56</sup> as has been confirmed in the preambles of the UDHR and ICESCR and e.g. in the Finnish Constitutional doctrine. For example, the preamble of the UDHR starts by stating that “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”<sup>57</sup> Consequently, it is not surprising both the General Comment 17 analyzing basic material interests for authors and General Comment 21 defining the right to science and culture also acknowledge natural persons as

53 Office of the High Commissioner for Human Rights, The Nature of States parties obligations (Art. 2, par.1):12/14/1990, fifth session, CESCR General Comment 3, paragraph 10 (emphasis original, hereafter General Comment No. 3) and Committee on Economic, Social and Cultural Rights, General Comment No.17 (2005) (hereafter General Comment No. 17), paragraph 35. See similarly regarding the Constitution of Finland e.g. Perusoikeuskomitean mietintö, betänkande av kommittén för grundläggande fri- och rättigheter 1002:3 (Committee Report 1992:3), p. 49. See also Pekka Hallberg, Perusoikeusjärjestelmä, published in Hallberg (et al), Perusoikeudet, Helsinki 2011, p. 29 and Heikki Karapuu, Perusoikeuksien tausta ja yleinen sisältö, published in Hallberg (et al), Perusoikeudet, Helsinki 2011, p. 63.

54 This interpretation is also supported by the General Comment of the Economic and Social Council stating that: “*The protection of material interests of authors in article 15, paragraph 1 (c), reflects the close linkage of this provision with the right to own property*, as recognized in article 17 of the Universal Declaration of Human Rights and in regional human rights instruments, as well as with the right of any worker to adequate remuneration (art. 7 (a)). Unlike other human rights, the material interests of authors are not directly linked to the personality of the creator, but contribute to the enjoyment of the right to an *adequate standard of living* (art. 11, para. 1).” See General Comment No. 17, paragraph 15, emphasis added.

55 See in more detail *Ojanen*, p. 108 – 109.

56 See e.g. Christopher *Harding*, Uta *Kohl* and Naomi *Salmon*, Human Rights in the Market Place, The Exploitation of Rights Protection by Economic Actors, Ashgate Publishing Limited 2008 (hereafter *Harding, Kohl & Salmon*), p. 32 – 33.

57 See also Committee on Economic, Social and Cultural Rights, Substantive issues arising in the implementation of the international covenant on economic, social and cultural rights, Follow-up to the day of general discussion on article 15.1 (c), Monday, 26 November 2001, Human rights and intellectual property (14 December 2001), chapter 5. Regarding the Finnish doctrines see e.g. Perusoikeuskomitean mietintö 1992: 3 (Committee Report 1992:3), p. 49 and 60, Government Bill 309/1993, p. 23 – 24, Mikael *Hidén*, Perusoikeuksien yleisiä kysymyksiä, published in Liisa Nieminen (eds.) Perusoikeudet Suomessa (hereafter *Hidén*), p. 10 ff, Pekka *Hallberg*, Perusoikeusjärjestelmä, published in Perusoikeudet (eds. Hallberg et al), Helsinki 2011, p. 41 and *Lämsineva*, p. 106 ff. See also Peter *Drahoš*, Intellectual Property and Human Rights, I.P.Q. 1999, 3, 349-371 (hereafter *Drahoš*), p. 7.

the subjects of fundamental rights protection. Challenges related to extending fundamental rights protection to legal persons shall be evaluated later in chapter 7.

## 2.3. STATES OBLIGATIONS AND APPLICABILITY OF FUNDAMENTAL RIGHTS

Rights are often classified to “individual and group rights”. Individual rights, often referred to as civil and political rights (such as right to freedom of speech or property right), are often considered “first generation rights” as provided e.g. by United Nations Convention on Civil and Political Rights. They serve to protect individuals against interventions of the government. As their intention is to prevent governments from threatening individuals, they are often called negative rights. Group or collective rights, which are also called as “second generation rights”, are social, economic and cultural in their nature (such as a right to be employed, right to housing and right to health care). They are generally constitutional assignments obligating governments to act in a certain (positive) way and aim to ensure equal treatment for citizens. Regarding the relationship of individual and collective rights the general rule is that if in conflict, individual rights override collective rights.<sup>58</sup>

Consequently the above mentioned means that States are obligated to guarantee that rights protected in Article 27 of the UDHR and Article 15 of the ICESCR are respected. One could also describe that as it pertains to the right to science and culture and protection for basic material interests resulting from creative works, States are obligated to *respect, protect* and *fulfill* them.<sup>59</sup> In more detail the right

58 In general regarding the classification between individual and collective rights in more detail see *Myllä*, p. 163 ff, Heikki *Karapuu*, Perusoikeuksien tausta ja yleinen sisältö, published in *Perusoikeudet*, Hallberg (eds.) Helsinki 2011, p. 72 - 73 and Kaarlo *Tuori*, Tuomarivaltio – uhka vai myytti, *Lakimies* 6/2003, p. 935. See also Committee Report 1992:3, p. 50 ff., Matti *Pellonpää*, Europeiska Mänskorsrätts konventionen. Helsinki 2007 (hereafter Pellonpää I). p. 25 ff and Kaarlo *Tuori*, Toomas *Kootas*, Sosiaalioikeus. 4th renewed edition. Juva 2008, p. 179 ff and Tarmo *Miettinen*, Tieteen vapaus. Jyväskylä 2001 (hereafter Miettinen), p. 30 and 43 ff. So called “third generation rights”, as a right to healthy environment and a right to natural resources, are often referred to as “soft law”. Significance of the third generation rights is somewhat unclear and often the two first generations are mentioned as more significant ones. For this reason they shall not be discussed in the article in more detail. See e.g. Committee Report 1992:3, p. 50.

59 See General Comment 17, paragraph 28 and General Comment 21 paragraph 48. The obligations have also been stated e.g. in United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, Thirty-ninth session 5-23 November 2007, General Comment No. 19: The Right to Social Security, paragraph 43, United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, Thirty-fifth session 7-25 November 2005, General Comment No. 18: The Right to Work, paragraph 22, United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, Thirty-fifth session 7-25 November 2005, General Comment No. 17: The Right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, paragraph 28, United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, Thirty-fourth session, Geneva, 25 April - 13 May 2005, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights, paragraph 17, United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, Twenty-ninth session, Geneva, 11-29 November 2002, General Comment No. 15: The Right to water, paragraph 20 and United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, Twenty-second session, Geneva, 25 April - 12 May 2000, General Comment No. 14: The Right to highest attainable standard of health, paragraph 33. See also *Shaver*, p. 125 – 126 and *Shaver and Sganga*, p. 15 – 16.

to respect requires the States refrain from interfering directly or indirectly with the enjoyment of the rights. The obligation to protect requires States to take steps to prevent third parties from interfering with the protected rights. Finally the obligation to fulfill requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the rights.<sup>60</sup>

As fundamental rights pose negative or positive obligations to governments, private individuals have not traditionally been directly obligated by their effect.<sup>61</sup> However, it has been acknowledged that fundamental rights may also have *horizontal effects* obligating individuals in their mutual relations (individual – individual or individual – other private legal entity). This effect is often referred to as *Drittwirkung*, a term based on German legal discourse.<sup>62</sup> Regarding ECHR references especially to articles 8 (right to privacy), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly) and article 2 of Protocol 4 (freedom of movement) have been made. However, under the case law of the European Court of Human Rights the scope has been broadened even further.<sup>63</sup>

In practice horizontal effects mean that weigh should be given to the principle of equality. In other words private parties in an equal position barely form a constitutional threat to each other. Instead economic power concentrations threaten more easily constitutional rights of those associating with these concentrations. *Obligation to protect the weaker party is emphasized the more disproportionate the relationship of the parties is.*<sup>64</sup>

Despite the above mentioned, it has been uncommon in practice to give relevance to horizontal effects of fundamental rights.<sup>65</sup> However, considering how power

60 Regarding the right to science see similarly e.g. *Miettinen*, p. 264 ff.

61 *Mylly*, p. 180 and *Ojanen*, p. 117.

62 See e.g. Committee Report 1992: 3, p. 129 – 132 and Government Bill 309/93 vp., p. 29. In general about horizontal effects, see e.g. *Lämsineva*, p. 103 – 105, *Hidén*, p. 21 – 22 and Anders von *Koskull*, Personuppgiftslagens tillämplighet på manuell behandling vid rekrytering till jobb. En fråga om grundläggande rättigheter. JFT 6/2002 (hereafter *Koskull*), p. 624 ff, Veli-Pekka *Viljanen*, Perusoikeuksien soveltamisala, published in *Perusoikeudet*, Hallberg (eds.) Helsinki 2011, p. 134 ff and Heikki *Karapuu*, Perusoikeuksien tausta ja yleinen sisältö, published in *Perusoikeudet*, Hallberg (eds.) Helsinki 2011, p. 86.

63 See *Mylly*, p. 183. See also *Ojanen*, p. 117. Significant cases have been *Walrave*, *Bosman* and *Defrenne*. In the case *Walrave*, *Case C-36/74 Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405, the European Court of Justice ruled that the prohibition against discrimination and freedom of movement of workers applied to a private association as rules of the association collectively aimed regulating gainful employment and services. In *Bosman*, *Case C-415/93 Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, the European Court of Justice followed similar reasoning as in *Walrave* and stated that “Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.” In *Defrenne*, *Case C-43/75 Defrenne v Sabena* [1976] ECR 455, the European Court of Justice ruled that the prohibition on discrimination between men and women “applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.”

64 See e.g. Kaarlo *Tuori* and Juha *Lavapuro*, Perusoikeuksien ja ihmisoikeuksien turvaamisvelvollisuus (PL 22§), published in Hallberg (eds.), *Perusoikeudet*, Helsinki 2011, p. 814, *Koskull*, p. 626 – 627 and Pekka *Lämsineva*, Konstitutionalismi, perusoikeudet ja yksityinen valta. Lakimies 7-8/2006, p. 1177 – 1190, especially, p. 1184 and *Lämsineva*, p. 103 – 105.

65 See *Mylly* p. 187 and The Opinion of Advocate General Kokott in C-275/06, *Productores de Música de España (Promusicae) v Telefonica de España SAU* [2008] ECR I-271 (at para 114).

balances between transnational corporations and states have changed as corporations have become sufficiently powerful to even pose threat to governments<sup>66</sup>, increasing amounts of claims have been made that protection afforded by fundamental rights should also extend to private parties and especially to the power of large corporations. In the words of Mylly:

“An increasing number of legal scholars see restricting the effects of fundamental to the relationship between the state and the individual as increasingly inadequate. Globally operating corporations, in particular, should according to many be responsible for fundamental rights violations under international law in some circumstances. They are increasingly powerful actors that some states lack the resources and some states the will to control, thus making the sole reliance on state duties inadequate. Such corporations may exercise major power over individuals and directly control their well being.”<sup>67</sup>

From the viewpoint of this book it is relevant to note that also General Comment 21 regarding the right to science and culture as provided in Article 15(a) of the ICESCR explicitly states that a violation of the right to science and culture “can occur through the direct action of a State party or of other entities or institutions that are insufficiently regulated by the State party, including, in particular, *those in the private sector*. Many violations of the right to take part in cultural life occur when States parties prevent access to cultural life, practices, goods and services by individuals or communities.”<sup>68</sup> In particular the General Comment has posited the States parties an obligation to pay attention “to the adverse consequences of globalization, undue privatization of goods and services, and deregulation on the right to participate in cultural life.”<sup>69</sup> The Constitutional Law Committee in Finland has also emphasized the idea that courts applying and interpreting copyright legislation should also take balance between copyright and other possibly conflicting rights – i.e. horizontal effects – into consideration.<sup>70</sup>

66 See e.g. Joel Bakan, *The Corporation, the Pathological Pursuit for Profit and Power*, New York 2004 (hereafter Bakan), p. 25: “Corporations have become sufficiently powerful to pose a threat to governments ... and that is particularly the case with respect to multinational corporations, who will have much less dependence upon the positions of particular governments ... corporations and their leaders have displaced politics and politicians as ... the new high priests and reigning oligarchs of our system.” See also *Harding, Kohl and Salmon*, p. 24, footnote 3 with references to literature documenting literature regarding corporations as human rights abusers.

67 See Mylly, p. 181-182 (emphasis original). See also Mylly, p. 191 ff, explaining possible limits for horizontal effects. See also *Harding, Kohl & Salmon*, p. 50.

68 See General Comment 21, paragraph 62 (emphasis added).

69 See General Comment 21, paragraph 50(b).

70 Committee Report 7/2005, p. 2. Section 106 of the CF explicitly sets on obligation for courts not to apply a regular law, which contradicts with the Constitution. It could be mentioned that also paragraph 31 of the General Comment 17 posits states parties obligation to prevent third parties from infringing the material interests of authors resulting from their productions. However, this protectionism shall be evaluated in more detail in its own chapter discussing copyright protection.

Finally it should be noted that regardless of whether one accepts direct horizontal effects of fundamental rights states have in any case a positive obligation to take actions to restrict breaches of human rights conducted by private actors. In other words it is a violation for the state to actively restrict enjoyment of a right, as well as to fail preventing other private parties from restricting enjoyment of a right.<sup>71</sup> For this reason in the end “*human rights enter the picture because the state permitted the breach of a right to occur.*”<sup>72</sup>

## 2.4. REGARDING POSSIBILITIES TO LIMIT FUNDAMENTAL RIGHTS

In an ideal democracy and constitutional State there should not be restrictions between fundamental rights and democracy. In fact fundamental rights are seen as prerequisites for democracy and must be protected also from possible violations of the legislator. According to *Tuori* one could talk of necessary self-restraints, which restrain activities of the legislator by controlling that fundamental rights are protected.<sup>73</sup> Thus fundamental rights and especially their protected core areas trump other rights and objectives (such as economics, if needed) in society. Certain fundamental rights have also been regarded as absolute. For example, under ECHR no derogation is permitted from right to life (except deaths resulting from lawful acts of war). Respectively fundamental rights protect from torture, inhuman, degrading treatment or punishment, slavery and retroactive criminal offences.<sup>74</sup> *Melander* considers also legality principle with its sub-principles as an absolute principle.<sup>75</sup>

Nevertheless, as fundamental rights may also overlap, strengthen or limit each other's scope they are also relative and may consequently be subject to restrictions.<sup>76</sup> In this respect the European Court of Justice has presented a *proportionality test* aiming to balance or weigh approach to fundamental rights. It characterizes methods used in all of the European countries and also the European Court of

71 *Shaver*, p. 167 and especially footnote 184.

72 *Mylly*, p. 182 (emphasis original).

73 See Kaarlo *Tuori*, Kriittinen oikeuspositivismi (translated into English as Critical legal positivism), Juva 2000, p 234 ff. See also Kaarlo *Tuori* Tuomarivaltio – uhka vai myytti, Lakimies 6/2003, p. 916 and Sakari *Melander*, Kriminolisointiteoria – rangaistavaksi säätämisen oikeudelliset rajoitukset, Suomalaisen lakimiesyhdistyksen julkaisuja, A-Sarja N:o 288, a doctoral dissertation. Vammala 2008 (hereafter *Melander*), p.71 ff. Also Wahlroos as an economist seems to accept this startingpoint. See, Björn *Wahlroos*, Markinat ja Demokratia, loppu enemmistön tyrannialle, Keuruu 2012, p. 182.

74 See articles 2, 3 and 4 of the ECHR. See also *Ojanen*, p. 121. In Finland also sub principles of the principle of legality are regarded as absolute. *Melander*, p. 75. Such principles are a requirement for accuracy regarding provisions to set criminalisations. Also the principle prohibiting to institute legal actions twice for the same cause of action (ne bis in idem) may be considered as a sub principle of principle of legality.

75 See *Melander*, p. 75.

76 See *Mylly*, p. 163. *Mylly* (footnote 57) refers to Rawls and points out that rights are self-limiting as well: “based on the fact that the basic liberties are to be the same for everyone and we can accordingly obtain greater liberty for ourselves if the same greater liberty is granted to everyone. This in turn could lead to unworkable and socially divisive extensions reducing the effective scope of the freedom in question.”



Human rights.<sup>77</sup> The proportionality test is comprised of three parts. The first asks whether the limitation of a right by an act of the Community institutions has a legitimate or justified aim or purpose from the standpoint of the objectives of the Treaty on European Union. The second part evaluates whether the act limiting a fundamental right is indispensable for the achievement of its goal. It is inquired from the viewpoint of human rights if more lenient means would be available for reaching the desired goal. Finally in the third stage it is examined if the restrictions are proportionate and tolerable interference to the human rights in relation to the pursued aim. At this stage a balance between the pursued goal and restricted human rights is evaluated.<sup>78</sup> It could be mentioned that ECJ has also regarded such general principles as legitimate expectations, non-discrimination and transparency relevant in its case law.<sup>79</sup> Moreover, the Courts of the European Community have recognized that there may be collective goods justifying a restriction of an individual's fundamental rights.<sup>80</sup> This requires weighing between the collective and individual right in relation to the possible restriction to the fundamental rights in question.

Finally it should be emphasized that possibilities to limit fundamental rights should be taken into consideration also because they are connected to possibilities to criminalize activities in a society. As a criminalization means a possibility to use public (coercive) power, it is clear that standards for criminalizing activities are high. For example, according to the Finnish Constitution, law cannot forbid actions the constitution specifically entitles. The Constitutional Law Committee has also stated that pecuniary penalty means interfering to the property of the convicted and imprisonment means interfering to a person's right to liberty.<sup>81</sup> Therefore, thorough

77 In general Article 4 of the ICESCR states about possibilities to set limitations. Regarding the right to science and culture and the right to material interests resulting from creative works the principle of proportionality has been stated in General Comment 21, paragraph 19 and General Comment 17, paragraph 23. See also *Myilly*, p. 165, *Ojanen*, p. 130.

78 Paul Craig, Grainne de Búrca, *EU Law, Text, Cases and Materials*, second edition, Oxford University Press 1998, p. 349 ff. See also *Ojanen*, p. 98 – 99 and p. 129, footnote 114. See also Craig, P. and de Búrca, G.: *EC Law. Text, Cases, & Materials*. Clarendon Press, Oxford 1995 (hereafter Craig and de Búrca), p. 340 – 349 and de Búrca, G.: *The Language of Rights and European Integration*. In Shaw, J. And More, G. (eds.), *New Legal Dynamics of European Union*. Clarendon Press, Oxford 1995 (hereafter *Búrca* 1995), p. 52. The conditions set by the proportionality test may also be read from a Memorandum of the Constitutional Law Committee of Finland regarding general conditions for restricting constitutional rights in the CF. See Memorandum of the Constitutional Law Committee 25/1994 vp, p. 5. See also Sakari Melander, *Kriminalisointiteoria – rangaistavaksi säätämisen oikeudelliset rajoitukset*. A Doctoral Dissertation. Vammala 2008 (hereafter Melander), p. 118. It is also possible to restrict the constitutional rights by way of exception i.e. when a limiting a constitutional right with a normal law is not possible. These types of restrictions are in principle forbidden and possible only thorough emergency laws, which necessitates same legislative procedure as enacting a constitutional right would necessitate. However, such legislative cannot affect the constitutional system as a whole. See Veli-Pekka Viljanen, *Perusoikeuksien rajoittaminen*, published in Hallberg (et al), *Perusoikeudet*, Helsinki 2011, p. 144 – 164.

79 Principle of legitimate expectations is connected to legal certainty and applies especially against retroactive measures. The principle of non-discrimination postulates that similarly placed persons should not be discriminated. Paul Craig, Grainne de Búrca, *EU Law, Text, Cases and Materials*, second edition, Oxford University Press 1998, p. 349 ff. See also *Ojanen*, p. 98 – 99.

80 See *Myilly*, p. 168 where he refers to Familiapress-case, Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR, I-3689. In the case it was regarded that importance of press diversity may weigh more than a restriction to pose quantitative or equivalent measures that restrict imports. The case also showed how collective right related to freedom of speech may trump individual element of the same right.

81 See Memorandum of the Constitutional Law Committee 23/1997 vp, p. 2. See also Melander, p. 118 – 119. According



criminal punishment, the Constitutional Law Committee of Finland has defined that criminal system always touches constitutional rights.<sup>82</sup> Therefore individual criminalizations should always be evaluated as limitations to constitutional rights as enacting a penal provision requires that general and possible special requirements for limiting constitutional rights should be fulfilled.<sup>83</sup> How the above analysis applies in relation to the right to science and culture and to the rights of authors shall be evaluated next.

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to Melander the memorandum of the Constitutional Law Committee (23/1997) is focal since in the memorandum the Constitutional Law Committee developed general principles related to relationship of constitutional rights and criminal law.

- 82 *Melander*, p. 119. Furthermore there are also certain constitution-based absolute limits for penal provisions related to possibilities to criminalize and enact punitive sanctions. Such are retroactive criminal law, death penalty, prohibition to torture or other punishments violating human dignity. See *Melander*, p. 75 and *Ojanen*, p. 121.
- 83 See Memorandum of the Constitutional Law Committee 23/1997 vp, p. 2 and *Melander*, p. 118 – 120 and p. 302 ff. Regarding the relationship of criminal law to the general possibilities to restrict constitutional rights the Constitutional Law Committee in Finland has concluded that: 1) A restriction must be based on law. This requirement may be derived also principle of legality enacted in Section 8 of the Constitution of Finland. 2) A restriction must be accurate. Also this requirement is derived from the principle of legality. 3) A restriction must be acceptable. A criminalisation must have a cogent social need justification from the viewpoint of the constitutional rights. 4) The core of a constitutional right cannot be restricted with a regular law. Every constitutional right has a core area protecting certain activities that cannot be criminalized. 5) A restriction must be proportionate. This means that the criminalization must be in proportion to the objective it aims to protect. It should be considered whether desired objective could be achieved by other means but thorough criminalization. 6) A requirement for necessary legal protection refers to possibilities to make an appeal and to other procedural rights. 7) A requirement to follow obligations set by human rights. See also Committee Report 25/1994, vp., p. 5 and Veli-Pekka *Viljanen*, *Perusoikeuksien rajoittaminen*, published in *Perusoikeudet*, Hallberg (eds.) Helsinki 2011, p. 160.

### 3 THE RIGHT TO SCIENCE AND CULTURE

He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.

- Thomas Jefferson, Letter to Isaac McPherson, 13 August 1813.

#### 3.1. JUDICIAL BACKGROUND

Article 27(1) of the UDHR states “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” A corresponding right has been provided in Article 15 1(a)(b) and 3 of the ICESCR. Although there has been little literature analyzing the “right to science and culture”, from a historical perspective at least the following justifications for its existence have been given.<sup>84</sup>

One aim of the right was to prevent misuse of science and technology as especially done during the Hitler’s regime.<sup>85</sup> It was also believed that the right could reject “Communism’s embrace of statism in favor of social democratic principles.”<sup>86</sup> UNESCO on the other hand believed that the right to science and culture promotes collaboration among the nations through education, science and culture, which also contributes to peace and security.<sup>87</sup> Finally, UDHR has also been connected to the American Declaration of the Rights and Duties of Man, which was completed about six months earlier containing rights similar to Article 27 of the UDHR.<sup>88</sup>

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84 In words of Chapman: “... this right is so obscure and its interpretation so neglected that the overwhelming majority of human rights advocates, governments, and international human rights bodies appear to be oblivious to its existence.” See Audrey R. Chapman, Towards on Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications, *Journal of Human Rights*, 8:1-36, 2009 (hereafter Chapman), p. 1. See also Shaver, p. 126 with footnotes and p. 151-153.

85 Chapman, p. 5 and Shaver, p. 135.

86 Shaver, p. 135.

87 Shaver, 141 – 142, Shaver, Lea Bishop and Sganga, Caterina, The Right to Take Part in Cultural Life: On Copyright and Human Rights (July 21, 2009). *Wisconsin International Law Journal*, Vol. 27, p. 637, 2009 (hereafter Shaver and Sganga, emphasis added). Available at SSRN: <http://ssrn.com/abstract=1437319> and Chapman, p. 5. UNESCO was founded in 1945 “to contribute to peace and security by promoting collaboration among the nations through education, science and culture.” See Article 1(1), of the Constitution of the United Nations Educational, Scientific and Cultural Organisation, adopted in London on 16 November 1945 (hereafter UNESCO Constitution).

88 Subsection 1 of the Article 13 of the American Declaration of the Rights and Duties of Man provides that “Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.” Subsection 2 continues that “He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of

Following the American Declaration of the Rights and Duties of Man framers of Article 27 of the UDHR were “concerned with ensuring universal access to the fruits of science and technology, as well as to the realm of cultural and artistic life, broadly understood.”<sup>89</sup> Thus history of the article 27(1) of the UDHR explains only in rather general terms assumed benefits related to the right science and culture.

Despite this and although the right has been without closer attention for longer time several international instruments has kept referring “to the right to equal participation in cultural activities;<sup>90</sup> the right to participate in all aspects of social and cultural life;<sup>91</sup> the right to participate fully in cultural and artistic life;<sup>92</sup> the right of access to and participation in cultural life;<sup>93</sup> and the right to take part on an equal basis with others in cultural life.<sup>94</sup> Instruments on civil and political rights,<sup>95</sup> on the rights of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public,<sup>96</sup> and to participate effectively in cultural life,<sup>97</sup> on the rights of indigenous peoples to their cultural institutions, ancestral lands, natural resources and traditional knowledge,<sup>98</sup> and on the right to development.”<sup>99</sup> Interest towards the right to science and culture as provided in Article 27(1) has also increased. In addition to legal literature<sup>100</sup> United Nations, Committee on Economic, Social and Cultural Rights has published in 2009 General Comment No. 21 discussing the rights protected under Article 15 1 (a) of the ICESCR.

Therefore, it may be argued that the right to science and culture exists and should correspondingly be given relevance.<sup>101</sup> Consequently in general terms it could already at this point be stated that the right to science and culture is similar to other human rights in that it is a universal, indivisible and interdependent right.<sup>102</sup> It is a freedom

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which he is the author.

89 See Shaver, p. 134. Shaver also refers to Johannes Morsink who argues that the final document also rejects Communism’s embrace of statism in favour of social democratic principles. Shaver, p. 135, where she refers to Johannes Morsink’s book, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* 1 (1999).

90 International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (e) (vi).

91 Convention on the Elimination of All Forms of Discrimination against Women, art. 13 (c).

92 Convention on the Rights of the Child, art. 31, para. 2.

93 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43, para. 1 (g).

94 Convention on the Rights of Persons with Disabilities, art. 30, para. 1.

95 In particular the International Covenant on Civil and Political Rights, arts. 17, 18, 19, 21 and 22.

96 International Covenant on Civil and Political Rights, art. 27.

97 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2, paras. 1 and 2. See also Framework Convention for the Protection of National Minorities (Council of Europe, ETS No. 157), art. 15.

98 United Nations Declaration on the Rights of Indigenous Peoples, in particular arts. 5, 8, and 10–13 ff. See also ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, in particular arts. 2, 5, 7, 8, and 13–15 ff.

99 Declaration on the Right to Development (General Assembly resolution 41/128), art. 1. In its general comment No. 4, paragraph 9, the Committee considers that rights cannot be viewed in isolation from other human rights contained in the two international Covenants and other applicable international instruments. See General Comment 21, paragraph 3.

100 See *Shaver* (passim) and *Shaver and Sganga* (passim).

101 See also *Shaver*, p. 155.

102 General Comment 21, paragraph 1.

obligating States both abstention/non-interference with the exercise of the right and positive action to secure the right, which means ensuring preconditions to realize the right.<sup>103</sup> How this could take place in more concrete shall be evaluated next.

### 3.1.1. A RIGHT FOR “EVERYONE”

Article 27(1) of the UDHR and Article 15 1(a)(b) of the ICESCR provide protection for “everyone”. In more detail paragraph 9 of the General Comment 21 defines that “In its general comment No.17 on the right to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which one is the author, the Committee recognizes that the term “everyone” in the first line of article 15 may denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.”<sup>104</sup> Following the starting point of fundamental rights, protection provided by the right to science and culture is in principle granted to natural persons. It covers also the “common man” i.e. not merely limited for professionals.<sup>105</sup> This is noteworthy as due to societal development as anyone can be a content producer and a user i.e. a prosumer. It should be noted that also freedom of science extends outside the academia, even to plain users of science.<sup>106</sup>

However, as explained, the right to science and culture covers also individuals “in association with others, or within a community or group”. Similarly freedom of science as protected in Article 15 (3) of the ICESCR and Section 16(3) of the CF provides protection for everyone although the protection is especially intended for researchers and scientific communities.<sup>107</sup> Just as freedom of expression is fulfilled

103 General Comment 21, paragraphs 6 and 44.

104 General Comment 21, paragraph 9.

105 See *Shaver*, p. 143 and 154, *Shaver and Sganga*, p. 9 – 12 and *Chapman*, p. 5 – 6. The general comment also makes specific references persons requiring special protection, which are women (para. 25), children (paras. 26 and 27), older persons (paras. 28 and 29), persons with disabilities (paras. 30 and 31), minorities (paras. 32 and 33), migrants (paras. 34 and 35), indigenous peoples (paras. 36 and 37) and persons living in poverty (paras. 38 and 39). However, one should not understand that protection provided to persons requiring special protection would somehow be stronger than protection provided to a “common man”. Instead governments have a special positive obligation to ensure that also persons requiring special protection are able to take part in cultural life in a similar manner as a common man.

106 This is because a definition for what is science is wide as any content which attempts to find truth with conviction, plan and sufficient form may be regarded as science. Albert Einstein’s theory of relativity may be given as a practical example of a scientific work conducted outside the academia. The theory was created in 1905, but Einstein got his first academic post only in 1909. See in more detail Kari *Engqvist*, Albert Einstein – mies ja tekoset, teoksessa *Suhteellista?*, Einsteinin suhteellisuusteorian jalanjäljillä, Jan *Rydman* (toim.), Tieteen päivät 2005, Yliopistopaino Kustannus ja Tieteellisen seurain valtuuskunta, p. 16–19. See also Pentti *Arajärvi*, Oikeus sivistykseen. Sivistykselliset persuoikeudet, oppivelvollisuus ja oikeuksien toteutumisen takeet. Helsinki 1994, p. 110. Thus also low quality science conducted by hobbyists is protected although it cannot escape scientific criticism. *Miettinen*, p. 269 – 270.

107 See *Miettinen*, p.270 and Pirjo Kontkanen, Tekijänoikeudet yliopistotutkimuksessa -ja opetuksessa. IPR University Center 2006 (hereafter Kontkanen 2006), p. 42. It could be mentioned that one may separate freedom of research (i.e. a right to de research by choosing a research method and topic), freedom of teaching and studying (i.e. a right to make decisions regarding teaching and a right to study topics one is interested in) and freedom of science (i.e. protectionism against

in a social context or the right to privacy protects families<sup>108</sup>, the right to science and culture protects scientific and cultural communities and groups from public authorities or other external influence. As these communities and groups need not to be perceived as legal persons it may be asked how the protection of individuals in a community or a group is being arranged?

As it pertains to scientific communities it has been argued e.g. in Finland that the protection is derived from the autonomy of universities, which is protected in Section 123 (1) of the CF. This institutional protection for scientific communities would protect decision making related to evaluation and orientation of scientific research as a right to self-criticism is an important institutional right for the scientific community.<sup>109</sup> According to *Miettinen* the right would also protect procedural forms of autonomy and the right to self criticism regardless of how the autonomy has been organized in practice. However, as there is no specific subject for protection, *Miettinen* understands that scientific communities would be protected *indirectly* through individuals involved.<sup>110</sup> Therefore a right for scientific communities would mean that universities (and to some extent other educational institutions) are entitled to self-organize teaching, manage their property, nominate teachers and officials, make suggestions regarding legislation on universities, decide on teaching and research, make financial decisions, make decisions regarding their internal governance and administration and provide standards as Universities Act and University Decree enable.<sup>111</sup> As a possibility to decide on research and teaching belongs also to the centre of university autonomy, scientific and educational communities should also have a possibility to decide on the relevant content used for research and teaching without external obstacles.<sup>112</sup>

The analysis does not yet answer to the question of what groups or communities the right to science and culture could protect. For example, in the above analysis for protectionism of scientific communities is derived from a specific constitutional norm (Section 123 of the CF providing autonomy of universities). No such specific norms exist for the right to science and culture in the constitution of Finland.<sup>113</sup> In this respect, it seems somewhat unclear on what grounds other groups or communities

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external interfering) from each other. *Miettinen*, p. 256. See also Government Bill 309/1993, p. 64.

108 See e.g. *Miettinen*, p. 272.

109 Kaarlo *Tuori*, *Sivistykselliset perusoikeudet* (CF 16 and 123), published in Hallberg, Pekka (et al): *Perusoikeudet. Oikeuden perusteokset*, Helsinki 2011 (hereafter *Tuori*), p. 625 – 628.

110 *Miettinen*, p. 271 – 275 and p. 292.

111 Government Bill 250/1990, p. 5, Committee Report 9/1997, p. 3, Government Bill 263/1996 vp., p. 12 and *Miettinen*, p. 271 – 279, 292, 293 and especially 408 ff and *Tuori*, p. 528 ff.

112 It should be remembered that protection for scientific communities may also extend outside the academia. *Miettinen*, p. 271 and *Tuori*, p. 530 – 531. According to *Tuori* this would provide e.g. justifications for having members of scientific communities in institutions deciding on funding for research. He also states that freedom of art may extend e.g. to theatres maintained by public authorities and would provide theatres freedom to make decisions regarding their artistic solutions. *Tuori*, p. 531.

113 It could be mentioned that a similar norm exists for Sami people of Finland. Section 17.3 of the Constitution of Finland provides that “The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act

could be protected.<sup>114</sup> Nevertheless, as the norm exists in the UDHR and ICESCR it cannot be neglected. Thus, one could contemplate whether the right to science and culture could extend its protection at least indirectly through individuals e.g. to Wikipedia and other similar online communities. However, as there is only little analysis regarding the right to science and culture it is somewhat challenging to give more specific definitions when it could extend its effect to groups and communities.

### 3.1.2. CULTURAL LIFE

As it pertains to defining culture, General Comment 21 states that “Various definitions of ‘culture’ have been postulated in the past and others may arise in the future. All of them, however, refer to the multifaceted content implicit in the concept of culture. In the Committee’s view, culture is a broad, inclusive concept encompassing all manifestations of human existence. The expression ‘cultural life’ is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future”.<sup>115</sup> In more concretely a definition of culture “encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities”.<sup>116</sup> In legal literature it has also been specified that cultural life includes among other things e.g. folklore, scientific journals, how-to books, and Wikipedia; storytelling, Haiku, detective novels, blogs, folk songs, the Beatles, mp3s, Ndebele house paintings, Pablo Picasso, scrap-booking, digital photography, performance, kabuki theatre, Bollywood, YouTube and all new media and genres that may arise in the future.<sup>117</sup> Thus concept of culture also covers new forms of culture, such as e.g. digital culture.<sup>118</sup> Consequently, we may see that a definition of “cultural life” should be understood to be broadly referring to both science and arts.

Due to the wide formulations we may see that also scientific expressions belong under the concept of cultural life. This may be read e.g. from the wording of the Article

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114 Similarly also *Miettinen*, p. 274.

115 General Comment 21, paragraphs 10 and 11.

116 General Comment 21, paragraphs 13. See also *Shaver and Sganga*, p. 642 – 645.

117 *Shaver and Sganga*, p. 644 – 645.

118 *Shaver and Sganga*, p. 664. See also *Shaver*, p. 156.

27(1) of the UDHR and from the Constitution of the United Nations Educational, Scientific and Cultural Organization.<sup>119</sup> Also paragraph 49 of the General Comment 21<sup>120</sup> and Constitutional Law Committee of Finland has connected scientific research to cultural rights.<sup>121</sup> Therefore, as freedom of science overlaps with the right to science and culture, obtaining new knowledge, sharing of information, scientific teaching and publishing, freedom of teaching and freedom to conduct research may also be regarded to be part of the right to science and culture.<sup>122</sup>

### 3.1.3. THE RIGHT TO “PARTICIPATE/TAKE PART IN”

“The right to take part in” forms an essential right related to the right to science and culture as it specifies the obligations for states to secure.<sup>123</sup> According to General Comment 21 the right “to participate/take part in” consists of three interrelated components, which are (a) participation, (b) access to, and (c) contribution to cultural life.<sup>124</sup>

*Participation* covers “the right of everyone – alone, or in association with others or as a community – to act freely, to choose his or her own identity, to identify or not with one or several communities or the change that choice, to take part in the political life of society, to engage in one’s own cultural practices and to express oneself in the language of one’s choice. Everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity.”<sup>125</sup>

119 As explained, Article 27(1) of the UDHR protects everyone a right “to enjoy the arts and to share in scientific advancement. Constitution of the United Nations Educational, Scientific and Cultural Organization, Article 1(1) and 1(2c) on the other hand aims to contribute to “education, science and culture” (Art 1.1) and to “maintain, increase and diffuse knowledge by assuring the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science...” See Constitution of the United Nations Educational, Scientific and Cultural Organization, Article 1(1) and 1(2c). See also the Declaration of the Principles of International Cultural Co-operation, Records of the General Conference, Fourteenth Session, Paris 1966, Articles 3 – 4. In more detail see also *Shaver*, p. 142 – 143.

120 It provides that to the “obligation to respect includes the adoption of specific measures aimed at achieving respect for the right of everyone ... (c) To enjoy the freedom to create ... which implies that States parties must abolish censorship of cultural activities in the arts and other forms of expression, if any; This obligation is closely related to the duty of States parties, under article 15, paragraph 3, ‘to respect the freedom indispensable for scientific research and creative activity.’” See General Comment 21, paragraph 49 and 49(c).

121 Committee Report 1992:3 (a memorandum of the Fundamental Rights Committee), p. 370 – 371 where the Constitutional Committee states that “Freedom of science, art and higher education create conditions for development of culture. See also *Miettinen*, p. 262.

122 *Miettinen*, p. 256285 – 286 and p. 480 ff. As explained, one may also separate freedom of research (i.e. a right to do research by choosing a research method and topic), freedom of teaching and studying (i.e. a teachers right to make decisions regarding teaching and a student’s right to study topics one is interested in) and freedom of science (i.e. protectionism against external interfering). See also *Kontkanen*, p. 98 – 99.

123 See also the Preamble of The UNESCO Constitution, which in general provides a similar right by stating that “The Governments of the States Parties to this Constitution on behalf of their peoples declare ... That the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfill in a spirit of mutual assistance and concern.”

124 General Comment 21, paragraph, 14 and 15. In general see also *Shaver* and *Sganga*, p. 645 – 646 and *Shaver*, p. 169 ff.

125 General Comment 21, paragraph 15(a)

Access is an important part of the right. It “covers in particular the right of everyone – alone, or in association with others or as a community – to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities.”<sup>126</sup>

“*Contribution to cultural life* refers to the right of everyone to be involved in creating the spiritual, material, intellectual, and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person’s cultural rights.”<sup>127</sup>

In addition the General Comment 21 specifies that there are necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination. In this respect it lists *availability, accessibility, acceptability, adoptability and appropriateness*.<sup>128</sup> *Availability* refers to presence of cultural goods and services, which are open for everyone to enjoy and benefit from through different sources and in various different forms. *Availability* refers to cultural life as something that is being created and enjoyed in communities and in public.<sup>129</sup> “*Accessibility* consists of effective and concrete opportunities for

126 General Comment 21, paragraph 15(b) (emphasis original). See also United Nations, Committee on Economic, Social and Cultural Rights, Twenty-second session, 25 April – 12 May 2000, General Comment No. 14, The Right to the highest attainable standard of health, article 12 of the International Covenant on Economic, Social and Cultural Rights, paragraph 12 (hereafter General Comment 14) related to the right to science: “Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues.”

127 General Comment 21, paragraph 15(c) (emphasis original).

128 See similarly *Shaver*, p. 170 – 171 and United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, Twenty-first session 15 November- 3 December 1999, General Comment No. 13: The Right to Education (hereafter General Comment No 13, United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, Twenty-second session, Geneva 25 April - 12 May 2000, General Comment No. 14: The Right to the Highest Attainable Standard of Health (hereafter General Comment No 14), United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, Twentieth session, Geneva 26 April - 14 May 1999, General Comment No. 12: Right to Adequate food (hereafter General Comment No 12) and United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, Twenty-ninth session, Geneva 11 - 29 November 2002, General Comment No. 15: The Right to Food (hereafter General Comment No 15).

129 Article 27(1) of the UDHR explicitly states that “everyone has the right freely to participate in the cultural life of the community...” General Comment 21 paragraph 16(a) more specifically describes accessibility as a “presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sports stadiums; literature, including folklore, and the arts in all forms; the shared open spaces essential to cultural interaction, such as parks, squares, avenues and streets; nature’s gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities. Of all the cultural goods, one of special value is the productive intercultural kinship that arises where diverse groups, minorities and communities can freely share



individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination. It is essential, in this regard, that access for older persons and persons with disabilities, as well as for those who live in poverty, is provided and facilitated. Accessibility also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination.”<sup>130</sup> *Acceptability* on the other hand entails that the laws, policies, strategies, programs and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such way as to be acceptable to the individuals and communities involved. *Adaptability* on the other hand refers to the flexibility and relevance of strategies, policies, programs and measures adopted by the State in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities. Finally, *appropriateness* refers to the realization of a specific human rights in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the indigenous people. In this respect one should take into account cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing designed and constructed.<sup>131</sup> Therefore, the right to participate consists of several elements that States should secure for their citizens. States should especially focus on protecting core areas of the right to science and culture.

### 3.1.4. THE PROTECTED CORE AREAS OF THE RIGHT TO SCIENCE AND CULTURE

When evaluating reciprocal relationship of the right to science and culture and the right to material interests resulting from creative works, it is important to define their protected core areas. The protected core area of the right to science and culture may be read from paragraphs 22 and 55 of the General Comment 21.

Paragraph 22 stipulates special topics for broad application of the right and states that “no shall be excluded from *access* to cultural practices, goods and services.”<sup>132</sup> Moreover, paragraph 55 of the General Comment stipulating specifically on the core obligations of States parties’ states that “the Covenant [ICESCR] entails at least the obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the

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the same territory.” It could also be mentioned that paragraph 12 of the General Comment 21 postulates that the “concept of culture must be seen not as a series of isolated manifestations or hermeneutic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity.”

<sup>130</sup> General Comment 21 paragraph 16(a).

<sup>131</sup> General Comment 21 paragraphs 16(c) (d) and (e).

<sup>132</sup> See paragraph 22 of the General Comment 21.

culture of their choice, which includes the following core obligations applicable with immediate effect: (a) To take legislative and any other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life; (b) To respect the right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice; (c) To respect the right of everyone to engage in their own cultural practices, while respecting human rights which entails, in particular, respecting freedom of thought, belief and religion; freedom of opinion and expression; a person's right to use the language of his or her choice; freedom of association and peaceful assembly; and freedom to choose and set up educational establishments; (d) *To eliminate any barriers or obstacles that inhibit or restrict a persons' access to the persons own culture or to other cultures, without discrimination and without consideration for frontiers of any kind*; (e) To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk."<sup>133</sup>

From the viewpoint of this book, it must be emphasized that that *fulfilling the element of access belongs to the State parties' core obligations*. Access, on the other hand, means, according to paragraph 15(b) of the General Comment that everyone has "the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities."<sup>134</sup> Moreover, *accessibility* consisted "of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination. It is essential, in this regard, that access for older persons and persons with disabilities, as well as for those who live in poverty, is provided and facilitated. *It also included the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination.*"<sup>135</sup>

This important feature of the element of access has also been acknowledged in the legal literature. For example, according to *Shaver* and *Sganga* the "right 'to take part in' culture consists in the ability to consume and create, individually and with

<sup>133</sup> General Comment 21 paragraph 55 (emphasis added).

<sup>134</sup> General Comment 21, paragraph 15(b) (emphasis original).

<sup>135</sup> General Comment 21 paragraph 16(a).

others. Culture exists to be shared and to inhabit a culture is to contribute to it.”<sup>136</sup> Therefore, when comparing to the right to science and culture to the protection granted to authors it may be seen that the element of access – in terms of copyright use of the content – belongs to the protected core area of the right to science and culture. In practice, this means that States should immediately “take those steps intended to guarantee access by everyone, without discrimination, to cultural life.”<sup>137</sup>

### 3.1.5. CONCLUDING REMARKS

Since the right to science and culture as provided by Article 27(1) of the UDHR and Article 15 1(a) of the ICESCR is opposing right in relation to rights of authors it is not surprising that a right to access – containing a right to receive and share information on all manifestations – belongs to the protected core area of the right to science and culture. Consequently it is understood in this book that the right to science and culture grants, *inter alia*, everyone access and possibility to share scientific and cultural products. In economical terms “Article 27 conceives of science, culture, and the arts – in short, the myriad expressions of human knowledge – as global public goods.”<sup>138</sup> In economic terms, knowledge may be understood as a non-rivalrous good, which in comparison to rival goods such as housing or food, is not diminished by consumption.<sup>139</sup> On the contrary, sharing knowledge or expressions as non-rivalrous goods increases their amounts. In other words, the more people share (in terms of copyright “copy” and make content available) content the more content exist. This would mean that the right to science and culture as provided by the article 27(1) of the UDHR and 15.1(a) of the ICESCR provide in terms of copyright natural persons and communities and groups a right to use content.

This does not need to mean that there would be an unlimited right to receive and share manifestations of cultural and scientific expressions. For example, it may be asked if the core area of the right to science and culture should cover using only a limited amount of content at a time. This is because it is difficult to find justifications

136 They also continue that “The right to take part in cultural life implies the ability to access, enjoy, engage with and extend the cultural inheritance; to enact, wear, perform, produce, apply, interpret, read, modify, extend and remix; to manifest, interact, share, repeat, reinterpret, translate, critique, combine and transform.” See *Shaver and Sganga*, p. 646. Later *Shaver* has also elaborated that “The touchstone concept of the right to science and culture, however, must be access. This concept is inherent in the earliest formulation of the right, which spoke simply of the right of all peoples to *take part in* cultural life, to *enjoy* the arts, and to *share* in the benefits of scientific progress. ... [The right to access] should be understood to include the ability to actively participate and share with others, not merely to play passive role of consumer.” *Shaver*, p. 169 and 172.

137 General Comment 21, paragraph 66.

138 *Shaver*, p. 155, 156 and 172 – 173. Relevance of markets in relation to fulfilment of the referred rights is acknowledged also in Continental countries. See e.g. *Haarmann*, p. 11.

139 See in more detail e.g. Mikko *Välimäki*, *The Rise of Open Source Licensing, A challenge to the use of Intellectual Property in the Software Industry*, a doctoral dissertation, Turre publishing 2005 (hereafter *Välimäki*), p. 53 ff. See also e.g. Peter *Suber*, *Knowledge as a public good*, SPARC Open Access Newsletter, issue 139, 2009, available at: <http://www.earlham.edu/~peters/fos/newsletter/11-02-09.htm>.

to argue that everyone needed a right to freely share unlimited amounts of content. On the other hand, nothing seems to narrow applicability of the right to science and culture to closed or small groups. As nowadays means exist to easily receive and share content it is difficult to understand why using those means should be prevented, if rights of others are also taken into consideration. This means that the right to science and culture should also cover the open networks of the information society to the same extent as author's rights do. In other words, if rights of authors apply to on the Internet / open networks, as a counter balance also the right to science and culture should be applied there to the same extent. In practice this indicates that the balance between the right to science and culture and rights of authors should be accomplished in a similar manner as they were perceived in the industrial society.

It could also be mentioned that as fundamental rights protect natural persons and their groups and communities, it is questionable if legal persons could enjoy protection as provided by Article 27(1) of the UDHR and 15 1(a) of the ICESCR at all. As later shall be explained in more detail, it is questionable whether/to what extent legal persons may enjoy fundamental and especially human rights protection at all. On the other hand, if legal persons owning copyrighted content may be protected by human or other fundamental rights, then, as a counter balance, legal persons using copyrighted content should be protected as well.

Finally, it should also be noted that the right to science and culture may be limited. For example, it has been explicitly stated in paragraph 18 of the General Comment 21 that "no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor limit their scope." Similarly paragraph 20 of the General Comment states that Article 15(a) of the ICESCR "may not be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Covenant or at their limitation to a greater extent than is provided therein."<sup>140</sup> Thus similarly as e.g. Article 10(2) of the ECHR stipulates limitations to freedom of expression regarding "national security, territorial integrity or public safety", the right to science and culture may be limited.<sup>141</sup> For example, human dignity and protection for privacy may restrict possibilities to obtain and share scientific information.<sup>142</sup>

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<sup>140</sup> See General Comment 21, paragraphs 18 and 20.

<sup>141</sup> Article 10(2) of the ECHR states that freedom of expression may be limited "... in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." See also Sami *Manninen*, *Sananvapaus ja julkisuus* (PL 12 §), published in *Perusoikeudet*, Hallberg (et al), Helsinki 2011, p. 477 – 478.

<sup>142</sup> See e.g. General Comment 14, paragraph 12: "Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality." See also e.g. Personal Data Act of Finland (523/1999) securing especially right to privacy, Medical Research Act of Finland (488/1999) applying "...to medical research carried

As the right to science and culture contains “the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person’s choice”<sup>143</sup> we may see that it is also clearly in conflict with rights of authors especially if they are protected through exclusive rights necessitating permission before use.<sup>144</sup> Consequently, before evaluating relationship between the right to science and culture in more detail it needs to be evaluated whether there exist any theories supporting the right to science and culture.<sup>145</sup>

## 3.2. THEORETICAL SUPPORT FOR THE RIGHT TO SCIENCE AND CULTURE

### 3.2.1. OPEN ACCESS

So called *open access* postulates that information is a public good and that free flow information is beneficial for the society.<sup>146</sup> In fact, it has been even argued that conducting science is prevented unless researchers are able to receive scientific information.<sup>147</sup> In this respect especially Stevan Harnad has envisaged the evolvement of a ‘Fourth Cognitive Revolution’ as a result of electronic journals instigated by researchers. Harnad has postulated that the Fourth Cognitive Revolution would be enabled by easy e-mail communication, open peer-review of research results before official approval for publication and the possibility of direct links from the text to the sources.<sup>148</sup> At the core of Open Access is the feature characteristic to

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out on persons, human embryos and human foetuses...” and an Act on the Openness of Government Activities of Finland (621/1999) establishing that in specified cases a researcher is not entitled to gain access to secret documents for scientific purposes unless an authority grants permission. See also Miettinen, p. 159 and Tuori, p. 526. Liisa Nieminen, Lapset tutkimuskohteena: Kuka päättää lapsen osallistumisesta tutkimukseen? Lakimies 2/2009, p. 226 ff. See also Chapman, p. 2.

143 General Comment 21 paragraph 16(b). See also in general about the right to access in paragraph 15(b) of the General Comment 21.

144 Already from the historical perspective “the purpose of the right to science and culture was quite different and very much in conflict with modern intellectual property law.” Shaver, p. 136.

145 Also Shaver has listed several economic theories recognising relevance of knowledge as a public good. Shaver, p. 156 ff.

146 In general about open access see e.g. Peter Suber, Open Access Overview, available at: <http://www.earlham.edu/~peters/fos/overview.htm>.

147 Miettinen, p. 307 and p. 231 where he refers to a memorandum of Pentti Arajärvi (Pentti Arajärven memorandum to parliament 18.9.1990, p. 27 – 28 and 32 – 33. See also Marjut Salokannel, Tieteessä tapahtuu 2003:1, p. 27 ff. Available at: <http://www.tieteessatapahtuu.fi/031/Salokannel.pdf>.

148 According to Harnad the first Cognitive Revolution was the emergence of language, the second the advent of writing and the third the invention of the printing press. See Recommendations for the promotion of open access in scientific publishing in Finland, Memorandum by the Open Access working group. Reports of the Ministry of Education, 2005:16, p. 10 and Stevan Harnad, Post-Gutenberg Galaxy: the Fourth Revolution in the Means of Production of Knowledge. Public-Access Computer Systems Review 2 (1): 39 - 53 (also reprinted in PACS Annual Review Volume 2 1992; and in R. D. Mason (ed.) Computer Conferencing: The Last Word. Beach Holme Publishers, 1992; and in: M. Strangelove & D. Kovacs: Directory of Electronic Journals, Newsletters, and Academic Discussion Lists (A. Okerson, ed), 2nd edition. Washington, DC, Association of Research Libraries, Office of Scientific & Academic Publishing, 1992); and in Hungarian translation in REPLIKA 1994; and in Japanese in “Research and Development of Scholarly Information Dissemination Systems 1994-1995.

all knowledge: you can give knowledge a way and still keep it.<sup>149</sup> Consequently the ideal state of open access can be listed as follows:

The research is readily available to anybody

- on the Internet with a www browser at no charge and without restriction
- in full-text format
- immediately and perpetually from the time of publication
- without constraint on use or distribution
- good scientific conduct, however, demands that content may not be falsified and the author and source must be properly acknowledged

Therefore, the aim of open access is completely free and unrestricted possibilities to read, print, and distribute content without payments or barriers. Usually, open access is connected education and scientific use, but when understood widely it is not limited to scientists, scholars, teachers and students, but extends also to “other curious minds”<sup>150</sup> and covers both public and private information.<sup>151</sup> Open Access sees the Internet as the most important channel for the unhindered dissemination of content.

### 3.2.2. EXCHANGE AS INNATE CHARACTER FOR HOMINIDS

According to Matt *Ridley* “the special feature of human intelligence is that it is collective, not individual – thanks to the invention of exchange and specialization.”<sup>152</sup> An argument that specialization and exchange of goods are beneficial for the society is not new, but Ridley’s reasoning goes further in comparison to previous writers as he sees that exchange is an innate character humans have had in relation to other hominids, which caused prosperity of humans. In Ridley’s words it was humans who “started, for the very first time, to exchange things between unrelated, unmarried individuals; to share, swap, barter and trade”.<sup>153</sup> According to him this explains how rare objects could have been moved far away from the source materials that were needed for their production. “The effect of this was to cause specialization,

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149 Recommendations for the promotion of open access in scientific publishing in Finland, Memorandum by the Open Access working group. Reports of the Ministry of Education, 2005:16, p. 9. Available at (in English): [http://www.minedu.fi/export/sites/default/OPM/Julkaisut/2005/liitteet/opm\\_250\\_tr16.pdf?lang=fi](http://www.minedu.fi/export/sites/default/OPM/Julkaisut/2005/liitteet/opm_250_tr16.pdf?lang=fi).

150 See e.g. Budapest Open Access Initiative, available at: <http://www.soros.org/openaccess/read>.

151 See FinnOA’s web-pages: [http://www.finnoa.fi/?page\\_id=14](http://www.finnoa.fi/?page_id=14). FinnOA “is constituted by a group of professionals interested in promoting open access to scientific information. These people come mainly from the academia, libraries and data management.” See FinnOa in English at: [http://www.finnoa.fi/?page\\_id=10](http://www.finnoa.fi/?page_id=10).

152 See Matt *Ridley*, *The Rational Optimist: How Prosperity Evolves*. HarperCollins Publishers 2010 (hereafter *Ridley*), p. 361. Ridley completed a Doctor of Philosophy in 1983 and has written several popular books. In more detail see e.g. [http://en.wikipedia.org/wiki/Matthew\\_White\\_Ridley\\_5th\\_Viscount\\_Ridley](http://en.wikipedia.org/wiki/Matthew_White_Ridley_5th_Viscount_Ridley) and <http://www.matriddle.co.uk/biography>.

153 *Ridley*, p. 56.

which in turn encouraged more specialization, which led to more exchange – and ‘progress’ was born, by which I mean technology and habits changing faster than anatomy.”<sup>154</sup> Consequently, Ridley does not accept that modern economy would owe its existence “to science (which is its beneficiary more than its benefactor); nor to money (which is not always a limiting factor); nor to patents (which often get in the way); nor to government (which is bad at innovation).”<sup>155</sup>

Instead Ridley believes that development is based on the characteristic feature of knowledge that you can give it away and still keep it. In Ridley’s words, innovators are “in the business of sharing. It follows that spillover – the fact that others pinch your ideas – is not an accidental and tiresome drawback for the inventor. It is the whole point of the exercise. By spilling over, an innovation meets other innovations and mates with them. The history of modern world is a history of ideas meeting, mixing, mating and mutating. And the reason that economic growth has accelerated so in the past two centuries is down to the fact that ideas have been mixing more than ever before.”<sup>156</sup>

Moreover, Ridley also sees that innovation process is a bottom-up instead of a top-down process. Consequently, he emphasizes role of natural persons and new companies, but is skeptical regarding efficiency of big companies to innovate.<sup>157</sup> Therefore, it is not surprising that Ridley sees the role of intellectual property important primarily when the innovation is happening, but “it does very little to explain why some times and places are more innovative than others.”<sup>158</sup> Regarding the role of prosumers he states that “Today the open-source software industry, with products such as Linux and Apache, is booming on the back of massive wave of selflessness – programmers who share their improvements with each other freely. Even Microsoft is being forced to embrace open-source systems and ‘cloud computing’ – shared on the net – blurring the line between free and proprietary computing.”<sup>159</sup>

However, it could be mentioned that *Gates*, co-founder and chairman of Microsoft, has both praised and criticized Ridley’s views. Gates accepts Ridley’s argument related to importance of exchange of goods is a key element related to all innovation. However, he disagrees with Ridley’s view is that innovation is not a “top-down” process and refers to Intel as an example, which according to

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154 *Ridley*, p. 56.

155 *Ridley*, p. 269.

156 *Ridley*, p. 270 – 272.

157 “Though [companies] may start out full of entrepreneurial zeal, once firms or bureaucracies grow large, they become risk-averse to the point of Luddism. The pioneer venture capitalist Georges Doriot said that the most dangerous moment in the life of a company was when it had succeeded, for then it stopped innovating.” *Ridley*, p. 260 – 261 and 322 ff.

158 *Ridley*, p. 267.

159 *Ridley*, p. 270 – 272 and p. 356. See also, Matt Ridley: When ideas have sex at TED (Technology, Entertainment, Design, is a nonprofit devoted to Ideas Worth Spreading, founded in 1984) [http://www.ted.com/talks/matt\\_ridley\\_when\\_ideas\\_have\\_sex.html](http://www.ted.com/talks/matt_ridley_when_ideas_have_sex.html).

Gates has “developed over 99% of its breakthroughs after its first success.”<sup>160</sup> These remarks made by Gates are noteworthy from two perspectives of this book. The first noteworthy point is related to the role of corporations in innovation. Firstly, as later shall be explained in more detail, the individualistic *droit d’auteur* copyright theory assumes that individual authors – not corporations – are at the core of creativity. In other words individualistic *droit d’auteur* copyright theory postulates that innovation is “a bottom up process”. This is relevant to keep in mind when we evaluate the reciprocal relationship of the right to science and culture and the protectionism granted authors on a fundamental right level. Secondly, it should be noted that both Ridley and Gates accept that exchange plays a crucial role regarding innovation and wealth creation. As explained, exchanging innovation and creations is today easier than ever before. Exchange is also the aim of exclusive based copyright system, as it should encourage using expressions through individual transactions between right holders and users. For this reason, it is important to evaluate possibilities of exchange as it pertains to use of content.

### 3.2.3. ECONOMICS OF NETWORKS

Although the main focus of the book is to evaluate prosumers acting for non-profit purposes in comparison to right holders and especially authors as private natural persons, theories based on network economics shall be evaluated. As corporations owning large quantities of copyrighted content for commercial purposes exist, it is reasonable to evaluate also economic theories providing support to claims that using content as postulated by the right to science and culture may be economically justified too.

Theories evaluating network economics imply that it may be beneficial if free dissemination of information is allowed.<sup>161</sup> It may be generalized that they see sharing, instead of withholding (as is case regarding copyright), information and

160 See Bill Gates, Africa Needs Aid, Not Flawed Theories. The Wall Street Journal, November 26, 2010, available at: <http://online.wsj.com/article/SB10001424052748704243904575630761699028330.html>. In the article Gates also criticized that Ridley “never explains what will replace all the companies that figure out how to make microchips or fertilizer or engines or drugs. Of course, many companies will come and go – that is a key element of capitalism – but corporations will continue to drive most innovation. It is a dangerous and widespread problem to underestimate the ongoing innovation that takes place within mature corporations.” In his response Ridley stated that “I know that these radical ideas are not to everybody’s taste, and he [Gates] is right that most innovation takes place within existing companies. But it is very striking that some of the most far-reaching innovations over the past several decades have come from driven, visionary outsiders like Mr. Gates, Mark Zuckerberg and Sergey Brin rather than from corporate research and development departments. What is more, these innovations have been achieved with much less capital investment up front than in the days of Andrew Carnegie and Henry Ford.” See, Matt Ridley, Africa Needs Growth, Not Pity and Big Plans, The Wall Street Journal, November 27, 2010, available at: <http://online.wsj.com/article/SB10001424052748704648604575621122887824544.html>.

161 In general also Castells’s networked society locates its central characteristic to networks as social and organizational models instead of groups and hierarchies. He sees networks, also Internet, as an enabler of looser and more flexible arrangements of human affairs, influencing widely different areas of society, including globalisation and industrialisation. See e.g. Castells, p. 176 and 180 where he states: “Networks are the fundamental stuff of which new organizations are and will be made” (emphasis original). See also Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom, Yale University Press 2006 (hereafter Benkler), p 3 and 18.



knowledge as the basis of knowledge and wealth creation. For example, according to a seminal article of *Nahapiet* and *Ghoshal* social capital may be defined as interactive resources embedded in the networks of social relations.<sup>162</sup> According to them, social capital also facilitates development of intellectual capital, consisting of personal and team relationships, trust, norm-based control values and network ties. This means that knowledge is always created in the social context; who you know directly affects what you know. Thus, intellectual capital is the ability of an organization to use its social capital and networks, and the density, connectivity (strength of ties) and hierarchy of the network links define the nature of the intellectual capital.<sup>163</sup> Value creation, in turn, is part of the processes and exchanges in the relations between people and organizations, and within different organizational systems without necessary immediate material or monetary involvement.<sup>164</sup> However, as a result of these exchanges the material and monetary value are also created.<sup>165</sup>

Moreover, *Harhoff*, *Henkel* and von *Hippel* have analyzed in their game theoretical model effects of “freely revealing” details of innovations to other manufacturers. By “free revealing” they “mean that all existing and potential intellectual property rights to that information are voluntarily given up by that innovator and all interested parties are given access to it – the information becomes a public good.”<sup>166</sup> Despite the fact that free revealing contradicts the classical tenant of economic theory of innovation, *Harhoff*, *Henkel* and von *Hippel* conclude that because of high transactions costs related to licensing, informational asymmetries and incompleteness of contracts “under very plausible parameter constellations it does indeed pay users to freely reveal their innovations to other users – even to direct rivals.”<sup>167</sup> Thus, the same challenges related to concluding transactions as shall be referred later in this book had an impact to the results of *Harhoffs*, *Henkels* and von *Hippels* article. Freer sharing of knowledge and content enable also others freer possibilities to build on the pre-existing knowledge/content.<sup>168</sup> Although open

162 See e.g. Janine *Nahapiet* & Sumantra *Ghoshal*, Social Capital, Intellectual Capital, and the Organizational Advantage. Academy of Management Review 1998 (hereafter *Nahapiet* and *Ghoshal*). Vol 23. No. 2, 242-266 (passim) and especially p. 243 where they state: “The central proposition of social capital theory is that networks of relationships constitute a valuable resource for the conduct of social affairs, providing their members with “the collectivity-owned capital, a ‘credential’ which entitles them to credit, in the various senses of the word.”

163 According to *Nahapiet* and *Ghoshal* “social capital facilitates the conditions necessary for exchange and combination, which are necessary for creation of intellectual capital. See *Nahapiet* and *Ghoshal*, p. 246 ff.

164 *Allee*, V., The Future of Knowledge, Butterworth-Heinemann 2002, Burlington MA.

165 Consequently it is not surprising that networks have also emerged as an important new area of inquiry within the field of entrepreneurship. *Johanisson*, B., In search of a methodology for entrepreneurial research, Class paper, Växjö and Lund Universities. Sweden 1995. Networks are viewed as the media through which actors gain access to a variety of resources held by other actors. A key benefit of networks for the entrepreneurial process is the access they provide to knowledge and advice. Relationships can also have a reputation related or signalling meaning. Networks can either be seen as means to reduce the uncertainty in the environment, or in the positive perception, firms network linkages may lead to subsequent beneficial resource exchange, or even to knowledge creation. *Hoang*, H. and *Antonin*, B., Network-based research in entrepreneurship: A critical review, Journal of Business Venturing, 18(2), p. 165 – 187.

166 Dietmar *Harhoff*, Joachim *Henkel*, Eric von *Hippel*, Profiting from voluntary information spillovers: how users benefit by freely revealing their innovations. Research Policy 32 (2003) (hereafter *Harahoff*, *Henkel* and von *Hippel*), p. 1753.

167 *Harahoff*, *Henkel* and von *Hippel*, p. 1754 and 1767.

168 For example, in words of *Hippel*: “It is our contention that completely fully-functional innovation networks can be

source/content projects are typical examples of this type of development, consumers as users – or prosumers as depicted in this article – may have a significant role of as innovators also on other fields but intangible property.<sup>169</sup>

It should be noted that there is no specific theory explaining why users/prosumers innovate. Despite this several individual reasons may be given. For example, users tend to innovate if information is “sticky” i.e. is costly to acquire, transfer, and use in a new location.<sup>170</sup> Users may also have unique capabilities enabling them to create low-cost innovative solutions or unique needs in relation to the product produced by the producer. They may also expect to benefit from their innovation by themselves or simply enjoy the creation process or find that their creations might leverage job opportunities.<sup>171</sup> Also related innovations and innovations revealed by others may incite to innovate.<sup>172</sup> Users may also become “user-entrepreneurs” or otherwise give rise to a new market niche or industry.” If innovation takes place in a distributed way, it also entails that other users share their innovations with other users and producers.<sup>173</sup>

Finally, freer sharing of content may also create benefits e.g. in the form of network effects: the more others consume a certain piece of content the more others do so as well.<sup>174</sup> In this respect Internet provides a unique platform for starting authors to share their content in order to obtain recognition. This recognition may end up to value creation in different ways.

Hietanen has described a distribution process of a movie that created with help of fan-culture and was posted freely downloadable for all: “While the movie [Star Wreck: In the Pirkinning] was distributed freely online using a [Creative Commons]-license, it managed at the same time to sell over 17.000 copies on DVD. In December 2005 the Finnish national TV-network YLE bought the broadcast license, devoted

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built up horizontally – with actors consisting only of innovation users (more precisely, “user/self-manufacturers”). Users participating in the network design and build innovative products for their own use – and also freely reveal their designs to others. Those others then replicate and improve the innovation that has been revealed and freely reveal their improvements in turn – or they may simply replicate the product that has been revealed and adopt it for their own, in-house use.” Eric von Hippel, Open source software projects as user innovation networks, MIT Sloan School of Management, June 2002 (hereafter Hippel), p 3.

169 See e.g. Marcel Bogers, Allan Afuah and Bettina Bastian, Users as Innovators: A Review, Critique, and Future Research Directions. *Journal of Management*, Vol. 36 No. 4, July 2010 (hereafter Bogers, Afuah and Bastian), p.859–860, where they list outdoor sports, mountain biking, kite surfing, rodeo kayaking, sailing, juvenile products, stereo components, automobiles and retail banking as examples of areas where consumer users (prosumers) have invented.

170 See Hippel, p. 9–10.

171 See Bogers, Afuah and Bastian, p. 860–863.

172 Hippel, p. 18. Välimäki has listed the following possible reasons regarding open source development: monetary and other material reward, fun and “scratch of the itch”, fame and merit, service to the society or mankind and instinct workmanship and ethical and altruistic reasons. See Välimäki, p. 58–59.

173 Bogers, Afuah and Bastian, p.859–860.

174 In more detail, see Stan Liebowitz, Rethinking the Newtorked Economy: The True Forces Driving the Digital Market Place, 2002, p. 151 ff. Available at: [http://wwwpub.utdallas.edu/~liebowit/knowledge\\_goods/book.pdf](http://wwwpub.utdallas.edu/~liebowit/knowledge_goods/book.pdf). See also Mikko Välimäki, Ajatuksia tekijänoikeuslainsäädännön uudistamiseksi, *Lakimies* 2/2004, p. 262.

one February night to Star Wreck on the digital culture channel and broadcasted the film on the national TV channel. The movie was later broadcasted on several European and Japanese TV channels. The TV broadcast licenses alone covered the production costs of the movie. A year after the initial release Universal Pictures bought the distribution rights to the special edition version of the DVD, even though the original version remains available as a free download.”<sup>175</sup>

### 3.3. CONCLUDING REMARKS REGARDING THE RIGHT TO SCIENCE AND CULTURE

The right to science and culture may be described as an opposing interest or as a counter balance to rights of authors protected in Articles 27(2) of the UDHR and 15(c) of the ICESCR. We may also see that theories justifying freer use of content may found. Consequently giving relevance to the right to science and culture may be found justified. In fact, it may be even argued that it is as important to use content as it is to create it. Economic rights of authors would also be insignificant if no content were used. In short a society where no content was used would be a dead society. This again explains how the right to science and culture and rights of authors interdependent on each other. In order to evaluate the right to science and culture with the right protecting essential economic interests of authors, rights of authors needs to be evaluated next.

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<sup>175</sup> See Herkko *Hietanen*, *The Pursuit of Efficient Copyright Licensing, How Some Rights Reserved Attempts to Solve the Problems of All Rights Reserved*, a doctoral dissertation, Lappeenranta 2008, p. 179. Album 'Ghosts' from Nine Inch Nails may also be used as an example in this respect. It was best selling album on Amazon MP3 although it was released for free distribution also. See in more detail e.g. Wikipedia for Ghosts I-IV. Available at: [http://en.wikipedia.org/wiki/Ghosts\\_I%E2%80%93IV](http://en.wikipedia.org/wiki/Ghosts_I%E2%80%93IV). For similar examples see also, Ahto *Apajalahti* – Kaj *Sotala*, *Jokapiraatinoikeus*, Vantaa 2010, p. 48 ff.

## 4 PROTECTION PROVIDED BY COPYRIGHT

“Everyone attempts to fend for oneself, but most amusing is life of the one who deludes himself the best possible way. Hahahaha!”

- Svidrigailov in Fyodor Dostoyevsky's Crime and Punishment

The first privilege for printing books was granted in 1469 in Venice.<sup>176</sup> Despite this, the roots of copyright are often ascribed to England where a royal charter was given in 1557 to The Company of Stationers of London in order to protect publishing.<sup>177</sup> Although stationer's rights protected private interests of stationers, regulations that are regarded as predecessors of copyright were also used as means for censorship.<sup>178</sup> There were also considerations whether copyright should be considered as a common law right (i.e. not statute based). Enacting the Statute of Queen Anne in 1709 did not stop these considerations and it was not until *Donaldson v. Becket* in 1774, when it was decided that there is no common law copyright, but copyright is based on a statute (and its term is limited).<sup>179</sup> The concept of an author neither appeared until the Statute of Queen Anne.<sup>180</sup> Therefore we may see that during the first two hundred years role of authors was petty as it came to copyright. As *Välimäki* puts it “... instead of creating incentives to new authors or innovators, the first privileges predating modern copyright laws started from the idea that the interests of those who *invested in the copying machines* [i.e. printing presses] and the supportive institutional structures should be protected.”<sup>181</sup>

176 See T.M. *Kivimäki*, Tekijänoikeus,, Helsinki 1948 (hereafter Kivimäki), p. 42 and *Kemppinen*, p. 42 – 43.

177 According to Patterson members of the book trade had developed some form of copyright prior to receiving their charter of incorporation in 1557. However, the royal charter added “dignity and powers”, which the company used in giving definite form to its “stationer's copyright.” The term “copy” was not used until 1701. See Lyman Ray Patterson, Copyright in Historical Perspective. Vanderbilt University Press 1968, p. 6-7, 21 and 28 – 29 (hereafter Patterson).

178 See, *Patterson*, p. 4. See also e.g. Komiteamietintö 1953:5, Ehdotus laiksi tekijänoikeudesta kirjallisiin ja taiteellisiin teoksiin (Committee Report 1953:5), p. 36 and *Haarmann*, p. 3 and 13.

179 *Donaldson v. Becket* (4 Burr 2408, 98 ER 257; 2 Bro PC 129, 1 ER 837 (1774)). In *Donaldson v. Becket* the House of Lords decided that copyright is limited in term. See Mark Rose, Authors and Owners, The Invention of Copyright. Harvard University Press, third printing 2002 (hereafter Rose), p. 5.

180 *Patterson*, p. 5. Even when the concept of author's right emerged it was used in a legal struggle between publishers. See Rose, p. 4 – 5.

181 Mikko *Välimäki*, The Rise of Open Source Licensing. A Challenge to the Use of Intellectual Property in the Software Industry. A doctoral dissertation, Turre Publishing 2005 (emphasis original), p. 59.

## 4.1. INDIVIDUAL AUTHORS AT THE CORE OF FUNDAMENTAL RIGHT PROTECTION

However, since the Statute of Queen Anne and the French revolution, a concept of an author as the initial right holder gained foothold in Europe. After the second World War, interests of authors were acknowledged in Article 27 (2) of the UDHR and later in Article 15 1 (c) of the ICESCR as subjects of protection. The central role of authors may be clearly read from both as they provide protection for “moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>182</sup>

Also today contemporary European individualistic *droit d’auteur* copyright theory posits authors as natural persons at the core of copyright.<sup>183</sup> So-called moral rights belonging to the core of copyright also emphasize the close connection between an author and his/her works in the Continental *droit d’auteur* system.<sup>184</sup> In other words, unlike in Anglo-American copyright thinking, *droit d’auteur* theory postulates that original author is always a human, not a legal person whose rights are always derivative from a natural person.<sup>185</sup> This is also consistent with fundamental rights, which in principle protect natural persons.

However, human rights conventions do not grant exclusive rights to authors. Instead several national legislations and international conventions since the Berne Convention (1886) do.<sup>186</sup> Due to exclusive rights granted to authors copyright is

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182 It could be mentioned that despite the rights of authors have longer “official” history in comparison to the right to science and culture, it was not self evident if they should be acknowledged in the human rights context. According to Shaver the “first insight to be gained from the historical view is that this second element of the right to science and culture [i.e. the protection for moral and material interests of authors] provoked significant controversy among the Declaration’s framers. The “access” element of Article 27 was included in the earliest draft, and virtually no objections to its inclusion were ever raised during the extended process of international debate and ratification. The notion of protection for creators’ interests, however, was introduced into the draft bill of rights later, initially rejected as inappropriate for inclusion in human rights document and subject to protracted debate.” *Shaver*, p. 144.

183 See Articles 27(2) of the UDHR and 15(c) of the ICESCR referring to authors and e.g. United Nations, Committee on Economic, Social and Cultural Rights, Thirty-fifth-session session, 7 – 25 November 2005, General Comment No. 17 (2005), paragraph 7 under headline “Author” referring to authors as natural persons. Respectively the starting point is same in Finland as paragraph 1 of the FCA states that the one who has created a work shall have copyright thereto. See paragraph 1 of the Finnish Copyright Act (8.7.1961/404). Paragraph 2 grants exclusivity and defines the contents economical rights. See also e.g. Government Bill 235/1987, p.7 and Committee Report 1980:12 explicitly stating that “copyright is built on individualism.” Committee Report 1980:12, p. 120-121. See also, *Kivimäki*, p. 23, 43 - 46 and 237 and *Haarmann*, p. 4 – 7.

184 See *Haarmann*, p. 5 – 6 and *Kivimäki*, p. 239 ff. Regarding moral rights as core rights see e.g. General Comment 17, paragraph 39 (b).

185 See e.g. Government Bill 235/1985, p. 7, *Haarmann*, p. 5 and 100 ff and *Kivimäki*, p. 23, 45, 61 and 237. It should be noted that as it pertains to computer programs and databases paragraph 40b of the Finnish Copyright Act states that computer programs and databases, which have been produced under employment, belong to the to the employer. However, also regarding computer programs the original author is a natural person although rights to computer programs and databases created in an employment relationship are automatically by law transferred to the employer. Anglo-American copyright laws have specific works made for hire –doctrine providing direct protection legal persons. See e.g. 17 U.S.C § 201 (b).

186 The Berne Convention for the Protection of Literary and Artistic Works, of September 9, 1886. The Berne Convention was completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971 and amended on September 28, 1979.

often perceived as a property right.<sup>187</sup> Despite this, intellectual property should not be considered to be a human right. In the words of the Economic and Social Council: “Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.”<sup>188</sup> Thus a distinction has been made between human rights and property rights.

It is understood here that the intent behind this separation is to emphasize the role of human rights in comparison to property right and not vice versa. It would be difficult to see that property right protection could somehow be “better” or “stronger” in comparison to protections provided by human rights. As explained, the aim of fundamental rights is to protect “essential foodstuffs”, “essential primary health care”, “basic shelter and housing”, “the most basic forms of education” etc.<sup>189</sup> In Finland it has also been stated that property does not have any specific position in relation to other fundamental rights and that it aims to secure essential property of individuals, not property masses of property as such.<sup>190</sup> *Property in this respect may be seen as one instrument to achieve the named human rights objectives.* This would mean protecting property when it enables securing the mentioned “basic/essential” human rights objectives. In other words, it is difficult to tie any societal value to property as such as this would mean that in a conflict situation weighing property to other fundamental rights as an equal right would always mean pricing the competing right in economic terms, which would be a rather unrewarding task

187 About copyright as a property right see e.g. *Kivimäki*, p. 43 – 44 where he refers to John Locke’s ideas of property. See also Rainer *Oesch*, Tekijänoikeudet ja perusoikeusnäkökulma, Lakimies 3/2005 (passim) and e.g. Statement of the Constitutional Law Committee 7/2005. Regarding John *Locke’s* concept on property see Two Treatise of Government (first publication in 1689), Second Treatise (sec. 27).

188 General Comment No. 17, paragraph 1. Furthermore, neither e.g. wordings of Article 27(2) of the UDHR nor Article 15 1(c) ICESCR necessitates that rights of authors should be protected thorough exclusive property rights. This means in words of Mylly: “Establishing an embrative exclusive property right regime is certainly not the only possible way to accomplish this task [protecting moral and material interests of authors and inventors]. For example, moral and material interests (i.e. protectionism for essential foodstuffs, essential primary health care, basic shelter and housing etc.) could be protected thorough a regime based on a liability rule or direct reward for the author or innovator.” See *Mylly*, p. 202.

189 This link between property right as securer of basic material interests of authors is also supported by the General Comment of the Economic and Social Council. It states that: “*The protection of material interests of authors in article 15, paragraph 1 (c), reflects the close linkage of this provision with the right to own property*, as recognized in article 17 of the Universal Declaration of Human Rights and in regional human rights instruments, as well as with the right of any worker to adequate remuneration (art. 7 (a)). Unlike other human rights, the material interests of authors are not directly linked to the personality of the creator, *but contribute to the enjoyment of the right to an adequate standard of living* (art. 11, para. 1).” See General Comment No. 17, paragraph 15, emphasis added. See also General Comment 17, paragraphs 35 and 39. Regarding the Constitution of Finland as a securer of basic rights see Perusoikeuskomitean mietintö 1992:3, Betänkande av kommittén för grundläggande fri och rättigheter (Committee Report 1992:3), p. 49, Pekka *Halberg*, Perusoikeusjärjestelmä, published in Perusoikeudet, Hallberg (et al) Helsinki 2011, p. 29.

190 *Länsineva* 2011, p. 551. See also Mikael *Koillinen* ja Juha *Lavapuro*, Tekijänoikeudet tietoyhteiskunnassa perusoikeudnäkökulmasta, published in Viestintäoikeus (eds Kulla et al), Helsinki 2002, p. 338. The property right norm of the Constitution of Finland should also be interpreted as a norm aiming to distribute wealth evenly in a society instead of concentrating wealth to the hands of few. *Länsineva* 2011, p. 564.

as we should start giving price to rights such as the right to privacy or to the right to life, liberty and security of person. This does not mean that property is not protected, but instead it is understood here that property as a fundamental right is protected to the extent it protects referred “essential/basic” interests. In other words property right as a fundamental right is limited, too.

An economist could also attempt to claim that as authors had petty role in the early history of copyright and because influence of industry may again be seen as more significant, value of a work should purely be considered to be at the core of copyright. However, if property right is excluded, no such fundamental rights exist. Moreover, this approach would not solve the problem we would have when one attempted to weigh property right as a competing right to other fundamental rights. Thus the imaginary economist would own us an answer to a question what is the economic value e.g. of life, liberty and security of person, or the right to privacy or the right to science and culture? S/he should also explain us on what basis such property right is limited? Thus fundamental rights posit boundaries to economics especially through their protected core areas, not vice versa.<sup>191</sup> One could also argue that an author’s possibility to assign his/her rights, i.e. freedom of contract, is at the core of copyright as it has been accepted that copyright as a property right may be assigned.<sup>192</sup> However, although copyright acknowledges freedom of contract, it is difficult to find any evidence from fundamental rights conventions that freedom of contract had been intended as a replacement for exclusive rights as a core right. Moreover, when freedom of contract is evaluated from the viewpoint of fundamental rights, effect of fundamental rights is intended to balance the relationship between the contracting parties (fix a disturbance of the contractual equilibrium).<sup>193</sup> Thus fundamental rights suggest that one should take into consideration the balance between different parties and public interests instead of favouring the strongest.<sup>194</sup>

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191 In more detail see e.g. chapter 2.4.

192 See also e.g. recital 30 of the Infosoc Directive stating that: “The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.” See also General Comment 17, paragraph 2 (emphasis added) stating: “In contrast to human rights, *intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else.*”

193 Chantal, Mak: Fundamental Rights in European Contract Law. A comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England (PhD thesis University of Amsterdam), Alphen aan den Rijn: Kluwer Law International 2008 (hereafter Mak), p. 7. See also Pekka Läsineva, Omaisuuuden suoja (PL 15 §), published in Perusoikeudet, Hallberg (et al), Helsinki 2011, p. 573.

194 See e.g. Pekka Läsineva, Omaisuuuden suoja (PL 15 §), published in Perusoikeudet, Hallberg (et al), Helsinki 2011, p. 572. See also see e.g. Mylly, p. 208 ff and Committee report 1992:3, p. 221 and Pekka Halberg, Perusoikeusjärjestelmä, published in Perusoikeudet, Hallberg (et al), Helsinki 2011, p. 50 – 51.

Consequently transferring rights does not mean that e.g. a transnational corporation would be in any need of fundamental rights protection protecting certain essential economic interests.<sup>195</sup> Finally, it should also be remembered that although freedom of contract in principle means that parties are free to enter into a contract of their choice and on the terms they prefer, it also includes the freedom not to enter a contract.<sup>196</sup> Thus, if freedom of contract would be seen as the core right of right holders, they should also accept that prosumers (or other users) could use content of right holders by simply declining from concluding a contract with a right holder. This would be the result because an author's exclusive right would not be at the core of copyright anymore as freedom of contract had replaced it. Consequently, it is not surprising that e.g. the Finnish doctrine for freedom of contract as a fundamental right focuses on protecting against retroactive influence of government to contractual relationships. This means that one should be able to trust stability of contractual relationships although even this starting point is not unconditional.

Consequently, as no explicit statements or open political debate to the opposite direction has taken place, it is postulated in this book following the individualistic *droit d'auteur* copyright theory that *as a fundamental right the protected core area of copyright aims to secure essential economic interests of individual authors as natural persons*. Therefore, in relation to copyright as a fundamental right it is understood here that property right system is merely *one way* of securing basic/essential material interests of authors.<sup>197</sup> How a copyright system based on exclusive rights attempts to do this in more detail shall be evaluated next.

195 It should be remembered that it is only rational to demand evaluating case by case whether interests of individual authors have been endangered or not. The copyright law has been traditionally interpreted so that we rigorously examine whether a certain expression – perhaps a singular word – exceeds required threshold for copyright protection or whether a digital copy has been produced on a certain platform.

196 *Mak*, p. 32.

197 This link between property right as securer of basic material interests of authors is also supported by the General Comment of the Economic and Social Council. It states that: “*The protection of material interests of authors in article 15, paragraph 1 (c), reflects the close linkage of this provision with the right to own property*, as recognized in article 17 of the Universal Declaration of Human Rights and in regional human rights instruments, as well as with the right of any worker to adequate remuneration (art. 7 (a)). Unlike other human rights, the material interests of authors are not directly linked to the personality of the creator, *but contribute to the enjoyment of the right to an adequate standard of living* (art. 11, para. 1).” See General Comment No. 17, paragraph 15, emphasis added. See also General Comment 17, paragraphs 35 and 39. Regarding the Constitution of Finland as a securer of basic rights see Perusoikeuskomitean mietintö 1992:3, Betänkande av kommittén för grundläggande fri och rättigheter (Committee Report 1992:3), p. 49, Pekka Halberg, Perusoikeusjärjestelmä, published in Perusoikeudet, Halberg (et al) Helsinki 2011, p. 29.



## 4.2 CREATION OF EXPRESSIONS AS THE AIM OF COPYRIGHT

### 4.2.1. IN GENERAL

Copyright theories postulate that scientific and cultural creativity is promoted through different types of expressions/content types created by authors. In this respect, idea/expression dichotomy is a traditional way to evaluate starting point of copyright protection. Regarding the dichotomy, a common norm as stated in the article 9, subsection 2 of the TRIPS Agreement is that “*Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.*”<sup>198</sup> It postulates that information and ideas as such fall outside the scope of copyright and neighboring right protection. Despite this, copyright covers wide range of different phenomena such as web pages or merely a speech or an improvised song as oral presentations may obtain copyright protection.

As it pertains to the protected expressions, paragraph 1 of the Finnish Copyright Act (and similarly e.g. article 2 of the Berne Convention) provides that expressions protected by copyright are, among others, literary and artistic works, oral presentations, musical and dramatic works, cinematographic works, photographic works, works of visual arts, architecture, artistic handicrafts and industrial art. In addition so-called neighboring rights protect e.g. performing artists, phonogram producers, photographs, visual recordings, radio- and television broadcasts, databases and newspaper bulletins. Therefore, although information and ideas fall outside the scope of copyright and neighboring right protection, it may be seen that copyright covers a wide range of different phenomena.<sup>199</sup>

However, in order for an expression to obtain copyright protection it should exceed a certain threshold.<sup>200</sup> Although no specific thresholds for protection have been set, case law provides guidelines for defining one. For example, in *Infopaq*-case, given 16 July 2009, the European Court of Justice held that: “An act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of [Infosoc-] Directive

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198 See also Article 1 subsection 2 of the Software Copyright Directive (Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs): “Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.

199 See e.g. Tekijänoikeustoimikunnan mietintö, Tekijänoikeudet tietoyhteiskunnassa, ehdotukset tietoyhteiskuntadirektiivin edellyttämiksi lainsäädännön muutoksiksi. Muut tekijänoikeuslain muutosehdotukset 2002:5 (hereafter Committee Report 2002:5), p. 21.

200 About the threshold in general see: Tuomas Mylly, Intellectual Property and European Economic Constitutional Law, The Trouble with Private Informational Power. Vaajakoski 2009 (hereafter Mylly), p. 342 ff and p. 363 ff and Haarmann, p. 256 ff.

...”<sup>201</sup> In other words, according to the European Court of Justice, expressions a mere *eleven words* long may be deemed to exceed the required level to be protected by copyright, and hence, requiring permission from relevant right holders for each individual copy. Following the *Infopaq*-case the High Court Chancery Division regarded in 2011 that headlines and/or extracts of newspaper articles may exceed required level for copyright protection.<sup>202</sup> Similarly in a case of the Finnish Copyright Council (2010:2) it was deemed that a sentence of *eight words* obtained copyright protection.<sup>203</sup> In fact, the same case may be interpreted so that the Copyright Council regards possible that in exceptional circumstances even *one word* might exceed threshold for copyright protection.<sup>204</sup>

Thus it is clear that expressions such as movies, music, literature, pictures, photographs easily exceed the required threshold for protection. However, it is challenging to determine where the threshold for protection specifically goes as there is no theory of art or science stipulating when the threshold for protection is exceeded and because ethical or moral evaluations are irrelevant when conducting the evaluation.<sup>205</sup> Additional challenges also appear when we attempt to apply a concept of an expression to a digital environment.

#### 4.2.2. A CHALLENGE RELATED TO USE OF EXPRESSIONS IN DIGITAL ENVIRONMENT

As explained, copyright theory postulates that in order to be protected, content must be an original and independent expression of its author.<sup>206</sup> Moral and ethical evaluations are irrelevant when evaluating whether certain content is protected or not. However, problems may occur if a certain piece of content resembles another. Traditionally, the method for evaluating whether content C1 created by X is a copy of content C2 created by Z has been quite straight forward. A so called *similarity assessment* between C1 and C2 has been conducted. In the assessment experts from that particular area of art or science evaluate whether C1 is a copy of C2 or a new

201 See Case C-40/08, *Infopaq International A/S v Danske Dagblades Forening*, Judgement of the Court (Fourth Chamber) of 16 July 2009. The court left it for the national courts to decide “if the elements thus reproduced are the expression of the intellectual creation of their author.”

202 *The Newspaper Licensing Agency Ltd & Ors v Meltwater Holding BV & Ors* [2011] EWCA Civ 890 (27 July 2011, available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2011/890.html>).

203 See *Copyright Council case 2010:2*. Copyright Council gives opinions regarding copyright, which do not bind courts and it is regulated in a Decree. See Copyright Decree 574/1995. See also www-pages of the Ministry of Education and Culture at: <http://www.minedu.fi/OPM/Tekijaenoikeus/tekijaenoikeusneuvosto/?lang=en>.

204 Similarly in legal literature e.g. Pirkko-Liisa Haarmann has argued that a slogan or e.g. name of a book may exceptionally obtain copyright protection. Haarmann, p. 70.

205 It should be mentioned that the low threshold applies also to neighbouring rights. The threshold for obtaining neighbouring right protection is often actually minimal, as it may be sufficient to merely fulfil a certain act stated in a particular paragraph as e.g. to broadcast a TV-signal, produce a phonogram or take a photograph.

206 See e.g. Ehdotus laiksi tekijänoikeudesta kirjallisiin ja taiteellisiin teoksiin (Committee Report) 1953:5, p. 44 and Tekijänoikeuskomitean V mietintö, äänitteiden ja audiovisuaalisten teosten kopiointi ja levitys (Committee Report 1990:32), p. 25.

independently protected content.<sup>207</sup> It may be regarded clear that when a similarity assessment is conducted, the work must be in a form perceptible to senses.

However, it is questionable what form “expression in a digital form” has when it is communicated on the Internet. In the end content in the form of information is always converted into binary digits 1 and 0.<sup>208</sup> This means that we may in theory ask whether e.g. music communicated on the Internet is in the correct form as postulated by copyright theory, or in the form of light or 1s and 0s? A radio program called Silikoni, which broadcasted computer software in Finland thorough radio waves in the mid 1980s may be used as a more concrete example. To human ears the broadcast of the code sounded as buzzing and chirping sounds.<sup>209</sup> Information may also be encrypted i.e. transformed into a form which is unreadable to anyone else but for those who have a key to open the encryption.<sup>210</sup> If there is no encryption key and decrypting the information is not otherwise possible, conducting any similarity test is impossible.

On the other hand, digital information may also be presented in various forms. For example, various net art projects have addressed even “computer viruses as a curious aesthetic and media cultural phenomenon. One such example was the Biennale.py net art virus from 2001, which was distributed on T-shirts and sold on CD-ROMs (\$1,500 each).”<sup>211</sup> Similarly computer software designed to circumvent a digital rights management protection (DRM) have been presented in different forms of art such as singing.<sup>212</sup> Dave Touretzky’s Gallery of CSS Descramblers contains illustrative examples of such expressions.<sup>213</sup>

207 See e.g. Markku *Helin*, *Imateriaalioikeuksien kohteesta*, Suomalaisen lakimiesyhdistyksen aikakauskirja, 1978 (hereafter *Helin*), p. 652 – 653.

208 Regarding binary code see e.g. Wikipedia: [http://en.wikipedia.org/wiki/Binary\\_code](http://en.wikipedia.org/wiki/Binary_code). See also Techterms.com for “digital”: <http://www.techterms.com/definition/digital>.

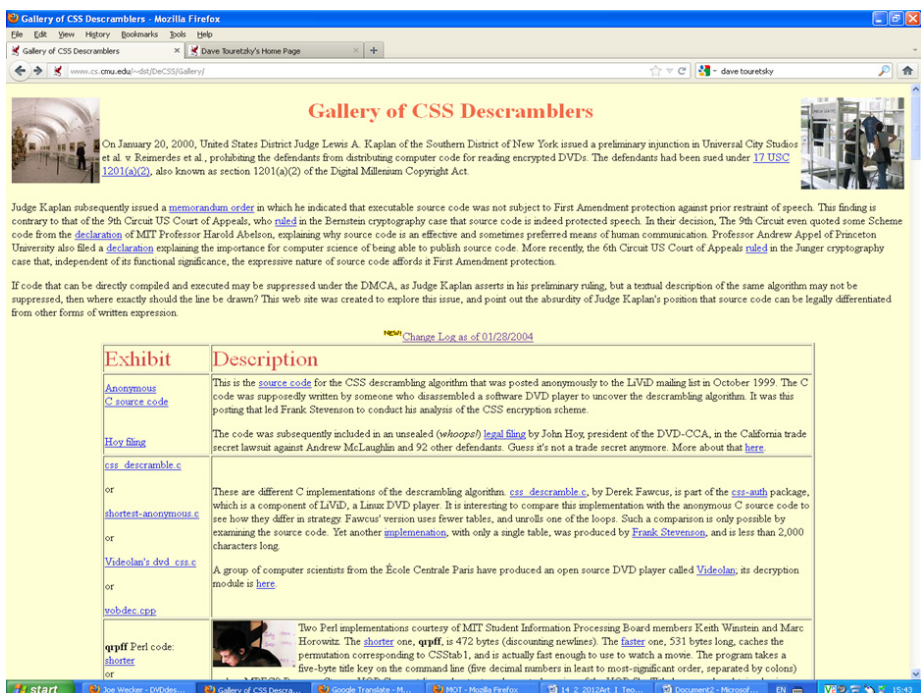
209 See e.g. Yle, *elävä arkisto*, from a program: “Se päivä muutti Suomen: Commodore 64” and Marko *Pulkkinen*, Commodore 64 kelpasi Bittiputaan mummollekin 23.11.2011, available at: [http://yle.fi/elavaarkisto/artikkeliit/commodore\\_64\\_kelpasi\\_bittiputaan\\_mummollekin\\_76616.html#media=76643](http://yle.fi/elavaarkisto/artikkeliit/commodore_64_kelpasi_bittiputaan_mummollekin_76616.html#media=76643). See also Jukka *Lindfors*, 24.5.2010, Silikoni lähetti radiossa surisevia ja piipittäviä tietokoneohjelmia, available at: [http://yle.fi/elavaarkisto/artikkeliit/silikoni\\_47372.html#media=47394](http://yle.fi/elavaarkisto/artikkeliit/silikoni_47372.html#media=47394).

210 According to Wikipedia: “In cryptography, **encryption** is the process of transforming information (referred to as plaintext) using an algorithm (called a cipher) to make it unreadable to anyone except those possessing special knowledge, usually referred to as a key (emphasis original).” In more detail Wikipedia on Encryption at: <http://en.wikipedia.org/wiki/Encryption>.

211 Jussi *Parikka*, *Digital Contagions, A Media Archeology of Computer Viruses*, Peter Lang Publishing, Inc., New York 2007, p. 286. See also Biennale.py project of Eva and Franco *Mattes* at [http://www.0100101110101101.org/home/biennale\\_py/index.html](http://www.0100101110101101.org/home/biennale_py/index.html). digitalcraft’s “I love you – computer\_viruses\_hacker\_culture” exhibition: [http://www.digitalcraft.org/index.php?artikel\\_id=244](http://www.digitalcraft.org/index.php?artikel_id=244) and Mark *Hachman*, What Does a Computer Virus Look Like? at [pcmag.com](http://www.pcmag.com/article2/0,2817,2280416,00.asp), <http://www.pcmag.com/article2/0,2817,2280416,00.asp>.

212 For example, listen to Joe *Wecker*’s song DVDdescramble.c (with lyrics) from Youtube: <http://www.youtube.com/watch?v=GekuuNqAiOg>. See also Jon *Ippolito*’s and Joline *Blaise*’s presentation Art From Illegal Computer Code, available at (Fora TV): [http://www.dailymotion.com/video/xgl88j\\_art-from-illegal-computer-code\\_news](http://www.dailymotion.com/video/xgl88j_art-from-illegal-computer-code_news).

213 See Dave *Touretzky*’s Gallery of CSS Descramblers at: <http://www.cs.cmu.edu/~dst/DeCSS/Gallery/>. Another thing is that a possibility to transform information into various artistic forms (such as tools to circumvent DRM systems) may also cause tension between copyright and other rights. In legal terms this means that e.g. norms providing protection for digital rights management systems are in conflict with basics of copyright and freedom of art and expression. As copyright and freedom of art and expression have a connection to constitutional rights, but norms related to DRMs protect merely business interests without constitutional connection, the conflict is obviously problematic from the viewpoint of constitutional rights.



Picture 1. An Extract from Dave Touretzky's Gallery of CSS Descramblers

Consequently, it is questionable whether and to what extent copyright theory is applicable evaluating “form of content” in digital environment. These types of challenges justify asking whether alternative solutions for securing the rights of authors should be applied regarding use of content on the Internet. If alternative means are not used we must assume or “see” that copyright applies to digital environment. One may also argue that the described problems are merely theoretical. If this is the case, the next question to be examined is to what extent it is possible to secure essential economic interests of authors regarding use of content on the Internet through property right.

## 4.3 COPYRIGHT AS A PROPERTY RIGHT

In contemporary legal thinking, legal relationships have been perceived as *relationships between persons*.<sup>214</sup> This means that norms should be addressed only to persons, not to objects. This distinction should be kept in mind as e.g. in the history

<sup>214</sup> See e.g. Wesley Newcomb *Hohfeld*, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, Yale Law Journal (23 Yale L.J. 16), November, 1013 (hereafter, Hohfeld). See also Simo *Zitting*, Omistajanvaihdoksesta, silmällä pitäen erityisesti lain huudatuksen vaikutuksia, Suomalaisen lakimiesyhdistyksen julkaisuja, A-sarja, N:o 43, Vammala 1951 (hereafter Zitting), p. 47. Regarding copyright see e.g. Markku *Helin*, Immateriaalioikeuksien kohteesta, Suomalaisen lakimiesyhdistyksen aikakauskirja, 1978 (hereafter Helin), p. 650, Mogens *Koktvedgaard* and Marianne *Levin*, Lärobok i immaterialrätt, Upphovsrätt, Patenträtt, Mönsterrätt, Känneteckensrätt – i Sverige, EU och internationellt, åttonde upplagan, Norstedts Juridik AB 2004 (hereafter Koktvedgaard – Levin), p. 38 and Pirkko-Liisa *Haarmann*, Tekijänoikeus ja lähiöikeudet, Jyväskylä 2005 (hereafter Haarmann), p. 49.

of copyright references have also been made to “intangible/immaterial” works as objects of rights. However, already decades ago such references to “immaterial/intangible” objects were discarded as inaccurate from legal thinking.<sup>215</sup> Consequently, with this starting point in mind, it may be asked how essential economic interests of individual authors could be fulfilled through property in the information society?

#### 4.3.1 REGARDING PROPERTY RIGHTS IN GENERAL

As it pertains to property rights, an exclusive right protected by the government to freely administer one’s property may be regarded as the primary right.<sup>216</sup> This primary right has a negative and a positive feature. A negative feature refers to the right to determine about the use of content i.e. exclude others from using it.<sup>217</sup> As it pertains to copyright, this has traditionally applied especially prior to publication of content indicating that author’s rights are at their strongest in cases when expressions have not been published.<sup>218</sup> A positive feature on the other hand refers to possibilities to assign rights related to use of expressions.

At this point, it could be reminded that as a fundamental right property right is not an isolated right in relation to other fundamental rights. The reciprocal nature of fundamental rights necessitates that also property right must be balanced in relation to other rights. From the viewpoint this book the tension between subsections 1 and 2 of the Article 27 of the UDHR is relevant as the legislator is obligated to secure rights depicted in both subsections.<sup>219</sup> How this balancing should be conducted from the viewpoint of individual authors if property right is being applied?

#### 4.3.2 FACTUAL AND LEGAL ADMINISTRATION OF RIGHTS

As it pertains to administration of property, the exclusive to freely administer one’s property may be divided into factual and legal administration of rights. *Factual administration* means a right to actually determine about the use of an object

<sup>215</sup> See e.g. *Helin* (passim) and *Koktvedgaard – Levin*, 36 – 38.

<sup>216</sup> About copyright as a property right see e.g. T. M. *Kivimäki*, Tekijänoikeus. Helsinki 1948 (hereafter Kivimäki) p. 43 – 44 where he refers to John Locke’s ideas of property. See also Rainer *Oesch*, Tekijänoikeudet ja perusoikeusnäkökulma, Lakimies 3/2005 (passim) and e.g. Statement of the Constitutional Law Committee 7/2005.

<sup>217</sup> See e.g. T.M. *Kivimäki*, Uudet tekijänoikeus ja valokuvauslait, Porvoo 1966, p. 2 – 3. See also T.M: *Kivimäki – Matti Ylöstalo*, Suomen siviilioikeuden oppikirja, yleinen osa, 1973, p. 73.

<sup>218</sup> For example, certain limitations to copyright apply only to published works. According to Article 3(3) of the Berne Convention for the Protection of Literary and Artistic Works “The expression “published works” means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.”

<sup>219</sup> See also e.g. T.M. *Kivimäki*, Uudet tekijänoikeus ja valokuvauslait, Porvoo 1966, p. 2 – 3.

whereas *legal administration* refers to right to sell, donate, and pawn etc. an object. Thus, the legal administration does not refer to possibilities to actually use the object, but determining about rights related to it. This separation is done in order to make a distinction between actually using an object from assigning property rights related to the object.<sup>220</sup>

Hohfeld has explained the separation in the following way: “The term, “transfer”, is a good example. If X says that he has transferred his watch to Y, he may conceivably mean, quite literally, that he has physically handed over the watch to Y; or, more likely, that he has “transferred” his legal interest, without any delivery of possession, -the latter, of course, being relatively figurative use of the term.”<sup>221</sup>

Also, in relation to copyright a right holder is to some extent factually able to administer the use of his/her expressions. A *factual possibility to administer* the use exists regarding unpublished expressions provided the right holder has pieces of the content him/herself and regarding live-performances, if the right holder him/her self is the performer. Thus, in practice factual possibilities to administer the use of copyrighted content are rather narrow.

The problem related to right holder’s possibilities to factually administer the use of his/her content may be illustrated with the following example: how could a right holder “silence” a person who performs his/her protected song in a public place (sings it in a restaurant or merely whistles it on the street) without the right holder’s permission? The question becomes even more problematic, if there are several singers. It simply would be impossible for an individual author to factually “silence” them both at the same time (as they may not even be at the same location), even if s/he had a right to do so.<sup>222</sup>

In other words, after the work has been posted openly available on the Internet an individual loses his/her factual possibility to administer the use of his/her works. However, despite the loss of factual possibilities to administer the use, it may be argued that a right holder retains a legal right to administer the use.

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220 Zitting, p.7 and Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, Yale Law Journal (23 Yale L.J. 16), November, 1913, under headline: Legal Conceptions Contrasted with Non-legal Conceptions.

221 See Hohfeld, under headline: Legal Conceptions Contrasted with Non-legal Conceptions.

222 See also Olli Vilanka, Rough Justice or Zero Tolerance? – Reassessing the Nature of Copyright in Light of Collective Licensing (Part I), published in “In Search of New IP Regimes”, a publication of IPR University Center 2010 (hereafter Vilanka 2010), chapter 3.1. It could be mentioned that in theory also factual administration contains a negative and positive feature to administer property: A right holder may factually exclude others from using his/her content by factually keeping it by him/herself (a negative right) or enable use of the content e.g. by deciding to perform it in a live concert (a positive right).



Regarding copyright as *a legal right to administer the use* an exclusive right to produce copies and make expressions available to the public are the most significant rights. It is understood in this book that in order to fulfill these legal rights – as rights directed to persons – individual authors and interested users/prosumers should conclude individual transactions with each other in order to produce copies and make content available to the public (instead of obligating the right holder to somehow “factually” control who, where and when uses his/her content).<sup>223</sup> In fact, if concluding transactions is not possible authors are not able to secure their basic material interests. This means that *a minimum requirement for functionality of copyright theory based on exclusive economic rights is the possibility to conclude transactions*. This is important to notice as it defines when it is justified to apply exclusive rights. In other words if it is not possible to conclude transactions, the legislator should attempt to secure basic material interests of authors in an alternative manner.<sup>224</sup>

It should be noted that impossibility to conclude transactions should not directly endanger rights of prosumers as protected in Article 27(1) of the UDHR. Prosumers are able to use content as the right to science and culture provides even if it would not be possible to conclude a transaction with a right holder.<sup>225</sup> It would be difficult to consider justified that the right to science and culture of prosumers could be endangered on the basis that it is not possible to fulfill rights of authors. It could also be mentioned that because individual control over use of content is often factually impossible and permissions from right holders are de facto obtained against compensation, copyright seems to form a certain type of business model embedded to law: law postulates that the primary way to fund content production is to ask permission from a right holder in certain points defined in law. When a copy is being produced and content is made available to the public are today those points.

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223 This should apply also to Anglo-American copyright system. See e.g. Wendy J. Gordon, Fair Use as Market Failure: a Structural and Economical Analysis of the Betamax Case and Its Predecessors, Columbia Law Review, December, 1982, Under B. An Overview of the Market Model: “1. The Market System. Economists in the tradition of Adam Smith defend our society’s primary dependence on markets by arguing that individual transactions in the marketplace serve both social needs and the needs of the individual persons participating.” It could be mentioned that often rights have been assigned to legal persons such as e.g. collective management organisations. If this is the case those legal persons conduct the administration.

224 Situations when individual administration is not considered possible may vary. For example, today collective licenses and platform fees have been introduced in the Nordic countries when it has been deemed impossible for authors to conclude transactions individually. In fact these paragraphs for collective administration are evidence that the legislator often acts as postulated above i.e. implements alternative means but individual transactions between prosumers and authors in order to secure economic interests of authors.

225 Another thing is that in such situation authors would not be able to obtain compensations unless alternative means but exclusive rights had been enacted in order to secure economic rights of authors.

Nevertheless, considering the separation between factual and legal rights, it seems more rational to perceive copyright as a legal right since otherwise its functionality would be minimal. Therefore it shall next be examined in more detail at what point individual authors and prosumers should conclude individual transactions for producing copies and making content available to the public on the Internet as economic rights of authors postulate.

## 4.4 RIGHT OF REPRODUCTION AND INTERNET

Article 2 of the Infosoc-Directive provides an author an exclusive right of “*direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.*”<sup>226</sup> Due to wide applicability of the right of reproduction one has traditionally examined in very detail whether an act of reproduction has taken place. This can be seen from official documents, legal literacy and case law.<sup>227</sup>

For example, according to the Commissions Explanatory memorandum for the proposal for the Infosoc-Directive (2001/29/EC) already a transmission of a video from a database in Germany to a home computer in Portugal may require at least 100 acts of storage (copying). Similarly e.g. *Sorvari* has described how “using a work on a computers monitor or on its stationary memory unit or on an external recording or from the Internet necessitates for technological reasons temporary reproduction of the work on the computer’s operating memory or on the monitors buffer storage. ... Such copies may easily turn into permanent backup copies and stay on the computer even after the power has been switched off.”<sup>228</sup> Therefore, relevant copies necessitating permission are in theory been formed constantly when content is being added and communicated on computers forming the Internet.<sup>229</sup>

226 See Article 2 of the Infosoc-Directive. See also Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979, article 9, which states that: “Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, *in any manner or form*” (emphasis added). A corresponding wide and strict formulation can be found from the paragraph 2, subsection 2 of the FCA.

227 This indicates that copyright doctrine has traditionally followed a strict literal (i.e. grammatical) reading of the law. Regarding theories for interpreting law see e.g. Aarnio *Aulis*, Mitä lainoppi on? Helsinki 1978, p. 101 and ff and similarly Raimo *Siltala*, Johdatus oikeusteoriaan, Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisut, Helsinki 2001, p. 110 and ff.

228 See Katarina *Sorvari*, Vastuu tekijänoikeuden loukkauksesta, Erityisesti tietoverkkoympäristössä. Academic Dissertation, Vantaa 2005, p. 93 ff. See also Katarina *Rajala*’s Licenciante: Rätten att framställa exemplar och temporär lagring i nätverksmiljö. NIR 1999, p. 103 ff., Sakari *Aalto* – Dieter *Paemen*, Copyright Licensing of Music on the Internet in the EU, Defensor Legis 2001, p. 631 (where they explain that a normal CD player creates constantly temporary copies in order to function as intended), Egbert *Dommering*, Copyright being washed away thorough the electronic sieve, Some thoughts on the impending copyright crisis, 1994, p. 4 – 6 and Tuomas *Mylly*, Tekijänoikeuslaki uudistuu?, Helsinki 2004, p. 4. Wide interpretation for the concept of reproduction has in fact prevailed a long time. Regarding court cases discussing acts of reproduction on computers in detail see e.g. *Apple Computer Inc. V. Formula International, Inc.* (594 F.supp 617 (C.D. Cal 1984) and *MAI Systems Corp. v. Peak Computer Inc.* 991 E.2d511 (9<sup>th</sup> cir.1993).

229 This indicates that copyright doctrine has traditionally followed a strict literal (i.e. grammatical) reading of the law. Regarding theories for interpreting law see e.g. Aarnio *Aulis*, Mitä lainoppi on? Helsinki 1978, p. 101 and ff and similarly Raimo *Siltala*, Johdatus oikeusteoriaan, Helsingin yliopiston oikeustieteellisen tiedekunnan julkaisut, Helsinki 2001, p. 110 and ff.



According to a study of IDC the amount of bits added to digital environment only in 2008 was 3,892,179,868,480,350,000,000 bits and in 2010 the amount was five times as many, and increasing.<sup>230</sup> In comparison the amount of printouts taken from the Internet (i.e. not copies taken by photocopying) by teachers in comprehensive schools and secondary schools in 2008 in Finland was approximately 5.000.000, which roughly corresponds to 60,000,000,000 bits.<sup>231</sup> Thus although heaps of content is being printed in educational institutions, the amount of information in the digital environment is significantly larger.<sup>232</sup> Used information is in various different and often protected forms of content as e.g. in text, sound, image, photographs, software and often mixed together as in forms of adaptations or audiovisual productions. The evolving information mass may also be referred to as “big data”.<sup>233</sup>

Thus, we may see that it may be challenging to apply the concept of reproduction on the Internet. Consequently it may firstly be asked who is liable in an author – user/prosumer –relationship (i.e. excluding possible intermediaries from the evaluation) for the produced copies and secondly when s/he who is liable for the copies should ask necessary permissions for each emerging one.

As it pertains to the first question and we evaluate possible liability in an author – prosumer-relationship, it is clear that only prosumers as users may be held liable

230 See John Gantz and David Reinsel, *A Digital Universe Decade – Are You Ready?*, 2010, available at: <http://www.emc.com/collateral/demos/microsites/idc-digital-universe/iview.htm> and John Gantz and David Reinsel, *IDC – Multimedia White Paper, As the Economy Contradicts, the Digital Universe Expands*, May 2009. Available at: <http://www.scribd.com/doc/15748837/IDC-Multimedia-White-Paper-As-the-Economy-Contracts-the-Digital-Universe-Expands>. An illustrative presentation about the increase of information on Internet have also been made e.g. by Michael Wesch in “an Anthropological introduction to YouTube” (hereafter Wesch), available at [http://www.youtube.com/watch?v=TPAO-IZ4\\_hU](http://www.youtube.com/watch?v=TPAO-IZ4_hU). It should be mentioned that as the information is communicated further in digital environment, it is subsequently copied again.

231 See Peruskoulujen ja lukioiden valokopiointitutkimus 30.9.2008, Jan-Otto Malmberg. A Study conducted by the Ministry of Education and Kopioisto, p. 8 and 17. The estimation related to the amount of bits is based on an assumption that one A4 sized paper in writing contains roughly 1500 bits of information. However, the estimation is rough as the amounts of bits per document varies based on what content is being used (e.g. text or pictures) and on how the information is stored. The estimation was given by Markku Wallgren, Novell Finland, technical expert, e-mail interview on 30<sup>th</sup> of March 2011. If we evaluate educational institutions more widely, on yearly basis hundreds of millions photocopies and prints are taken in elementary schools and secondary schools in Finland. For example, in 2008 the amount of copies and printouts was over 400.000.000. See Jan-Otto Malmberg, *Peruskoulujen ja lukioiden valokopiointitutkimus 2008*, p.8. In communal and governmental bodies the yearly number is altogether approximately 900.000.000. See, homepage of Kopioisto, available at (in Finnish), [http://www.kopioisto.fi/kopioisto/teosten\\_kayttoluvat/valokopiointi/fi\\_FI/valokopiointi/](http://www.kopioisto.fi/kopioisto/teosten_kayttoluvat/valokopiointi/fi_FI/valokopiointi/).

232 As additional examples it could be stated that 35 hours of video was being uploaded every minute to YouTube in 2010. See YouTube’s blog, available at <http://youtube-global.blogspot.com/2010/11/great-scott-over-35-hours-of-video.html>. In general about the use of Internet in workplaces see e.g. Manuel Castells, *The Rise of Network Society, The Information Age: Economy, Society and Culture, Volume I, Second Edition*, Blackwell Publishers 2000, p. 375 and 390. About the increase of information in social media general see e.g. Gary Hayes’s Social Media counter <http://www.personalizemedia.com/garys-social-media-count/> and about the increase of information on the Internet in more general see e.g. EMC’s World Wide Information Growth Ticker, available at: <http://www.emc.com/leadership/programs/digital-universe.htm>.

233 For example IBM has defined big data the following way: “Every day, we create 2.5 quintillion bytes of data — so much that 90% of the data in the world today has been created in the last two years alone. This data comes from everywhere: sensors used to gather climate information, posts to social media sites, digital pictures and videos, purchase transaction records, and cell phone GPS signals to name a few. This data is **big data**.” See, IBM’s definition at: <http://www-01.ibm.com/software/data/bigdata/>. See also Wikipedia for “big data” at: [http://en.wikipedia.org/wiki/Big\\_data](http://en.wikipedia.org/wiki/Big_data).

for the copies that are being produced when content is being communicated on the Internet. This is because it is clear that one cannot hold the right holder liable for use of his/her own content.

However, as it pertains to the question when a user/prosumer should be held liable for the copies a problem is that it is difficult to see how a user (or even author) could be aware of all the possibly relevant copies that are being formed on different computers and platforms on the Internet during transmission processes. In fact, considering the information mass on the Internet, it is difficult to see that *anyone* could supervise all the copies that are being produced on different platforms and computers during communication processes. This applies even if it was possible to permanently record all the transmitted information and one would later attempt to go through the constantly increasing information mass.<sup>234</sup> Who could constantly examine in detail each piece of copy of the growing information mass? This rather clearly implies that an idea of an individual author rigorously administering who, where and when uses his/her expressions on the Internet in order to conclude relevant transactions is rather challenging.<sup>235</sup>

However, it should be noted that in this respect article 5(1) of the Infosoc Directive (and correspondingly paragraph 11(a) of the Finnish Copyright Act) attempt to clarify the situation. Article 5(1) of the Infosoc directive posits a mandatory exemption exempting from copyright “transient or incidental” copies, which are an “integral and essential part of a technological process and whose sole purpose is to enable [...] a transmission in a network between third parties by an intermediary, or [...] a lawful use of a work or other subject-matter [...], and which have no independent economic significance”. Intention of the exemption is to enable normal communication processes in digital environment without risk of infringing copyright as otherwise use of Internet as it is being used today would not be possible. Although it is mainly directed to intermediaries<sup>236</sup>, it also applies to copies in general as it exempts copies completely from copyright.<sup>237</sup> Thus, the exemption provided by article 5(1) of the Infosoc directive formally alleviates problems related to constantly forming reproductions on the Internet. However, it does not specifically state when use

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234 Regarding dig data and challenges of governments see e.g. Tom *Kalil*, Big Data is a Big Deal, White House, Office of Science and Technology Policy, available at <http://www.whitehouse.gov/blog/2012/03/29/big-data-big-deal>. Regarding the private sector the Pirate Bay case may be used as an example. The Pirate Bay is a file sharing service, which has been convicted as violating copyrights. See e.g. decision of Svea hovrätt case B 4041-09. Despite court ruling(s) stating the service illegal claimants (several companies) are struggling to to “administer” content used with help of this single web-site.

235 Alf Rehn has described that focusing on copies in digital environment resembles a certain type of valorisation of business models. Alf *Rehn* at a course: Perspectives on Immateriality I: Copyright and New Business Logics, 30.11. – 2.12.2005.

236 Intermediaries are third parties who offer intermediation services between those who transmit (in terms of copyright copy and communicate) content. Regarding varying practices see also Gerald *Spindler*, Giovanni Maria *Riccio* and Aurélie *Van Der Perre* (under the direction of the professor *Montero*): Study on the Liability of Internet Intermediaries (Markt 2006/09/E, Service Contract ETD 2006/IME2/69). Thibault *Verbies*, ULYS, p.7, available at: [http://ec.europa.eu/internal\\_market/e-commerce/docs/study/liability/final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf). See also Taina *Pihljarinne*, Lupa Linkittää – toisen aineiston hyödyntämisen tekijänoikeudelliset rajat, Vantaa 2012 (hereafter *Pihljarinne*) (passim).

237 See also P. Bernt *Hugenholtz* (with the assistance of Kamiel *Koelman*), DIPPER, Digital Intellectual Property Practice Economic Report, Institute for Information Law (IViR) (hereafter *Hugenholtz*), p. 23.

is exempted leaving room for interpretation. Moreover, as explained, even if all the communicated information was permanently recorded it would most likely be impossible for anyone to constantly go through the constantly growing information mass in order to track down exempted and not-exempted copies combined to appropriate right holders in order that necessary transactions could be concluded. Consequently in this respect it seems that Article 5(1) of the Infosoc Directive merely provides a declaration stating “not all copies are relevant”.

Thus it is difficult to see that Article 5(1) of the Infosoc Directive would either help us exactly defining when a user/prosumer would be liable for copies that are being produced on the Internet. The situation is in theory problematic as we do not exactly know when a license is needed. Nevertheless it should be noted that there does not seem to be much practical problems regarding applicability of Article 5(1) of the Infosoc directive. This is most likely due to the fact that it is impossible to supervise each emerging copy because it is difficult for the right holders to sue users for copies that do not fall under the exemption provided by the Article 5(1) of the Infosoc directive.

However, it may be accepted that users may be held liable for those copies they intentionally produce for use. For example, it may be accepted that copies a person wittingly produces onto his/her hard-drive belong under the right of reproduction.<sup>238</sup> Possibilities to ask permissions in order to produce these copies are comparable to possibilities to ask permissions to make content available to the public, a topic which shall be evaluated next.

## 4.5 RIGHT TO MAKE CONTENT AVAILABLE TO THE PUBLIC AND INTERNET

The author's right to make the content available to the public has been enacted e.g. in article 3 of the Infosoc directive (and article 2 of the Finnish Copyright Act). According to the Article 3 of the Infosoc directive the right provides that “*Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.*”<sup>239</sup>

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238 Another thing is that a particular limitation (such as a right to produce private copies) may apply to those copies.

239 It could be mentioned that the on-demand type of right (the last clause of the Article 3) would somehow differ from making content made available thorough one-way channels as in on-demand types of services content is being transmitted on request of the receiver. However, as it pertains to Internet, it is difficult to see when content is not communicated to the receiver on his/her request. For example, what is the difference between requesting a television to change to a certain channel from requesting a computer to obtain a certain information e.g. through search engine or a web browser? What if your television set has an internet connection and a web browser (as is often case today) and you use it to watch online TV? How come watching the online TV would not be based on an individual requests in comparison to traditional TV? It is difficult to find coherent answers to the questions. Lastly it could also be mentioned that the Directive EEC/89/552 regarding broadcasting is so old that at the time commercialisation and popularity of Internet, which took place in the

Thus the right covers communicating content on the Internet i.e. in short necessitates that always when content is being posted openly available for everyone in digital environment, permission from a right holder should be asked. In this respect, the situation is clearer in comparison to the right of reproduction: always when a person communicates content on the Internet or otherwise posts content available to the public s/he needs permission from an adequate right holder. It is irrelevant whether any content is actually being communicated, but a possibility to obtain content suffices for the liability.<sup>240</sup> Thus, even if a limitation allowed a prosumer to produce a copy onto his/her computer, s/he would still need permission for making it available to the public. To what extent it is rational to assume that prosumers and authors conclude individual transactions in order to make content available to the public on the Internet in practice shall be evaluated later in chapter 6.

Therefore, it seems that possible challenges regarding applicability of copyright on the Internet are related to the concept of reproduction. As copyright is often connected to acts of communication, the next chapters evaluate whether results from communicational research could provide more rational way to perceive the concept of reproduction on the Internet.

## 4.6 COMPARING BASICS OF COMMUNICATIONAL RESEARCH TO RIGHT OF REPRODUCTION

### 4.6.1 IN GENERAL

A close connection between copyright and communication may be seen already from the writings of Immanuel *Kant*. He wrote that "A book is a writing (it does not matter, here, whether it is written in hand or set in type, whether it has few or many pages), which represents a discourse that someone delivers to the public by visible linguistic signs. One who *speaks* to the public in his own name is called the *author* (*autor*). One who, through a writing, discourses publicly in another's (the author's) name is a *publisher*. When a publisher does this with author's permission, he is the legitimate publisher; but if he does it without the author's permission, he is an illegitimate publisher, that is an *unauthorized publisher*."<sup>241</sup>

In more recent literature, the connection may be read from WIPO's Intellectual Property Handbook. It states that copyright is virtually concerned with "all forms and methods of public communication, not only printed publications but also such

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1990s, had not even started.

240 See also *Hugenholtz*, p. 27: "The relevant act of exploitation commences, and is completed, by providing public access to the protected work. Whether or not, in a given situation, copies of the work are actually downloaded, received or otherwise consumed, is quite irrelevant."

241 Immanuel *Kant*, *The Metaphysics of Morals*, Introduction, translation, and notes by Mary *Gregor*, Cambridge University Press, 1991, p. 106 (emphasis original).

matters as sound and television broadcasting, films for public exhibition in cinemas, etc. and even computerized systems for the storage and retrieval of information.”<sup>242</sup>

In general all subgroups under the right to make content available (presenting, communicating displaying and distributing) also seem to resemble some form of communication. One usage form is even named as “right of communication”.<sup>243</sup> However, as it pertains to the right of reproduction, the situation is not as clear requiring more detailed examination. For this reason concept of reproduction shall be compared in more detail to basics of communicational research as presented by Osmo A. Wiio and C. E. Shannon.<sup>244</sup>

#### 4.6.2 RIGHT OF REPRODUCTION AS AN ACT OF COMMUNICATION

According to Wiio all conceivable means for communication may be divided into two main categories: either matter is being modified into a certain form in order to be delivered to a recipient or energy is being modified in order to be transmitted to a recipient. The systems may converge as happens e.g. when a fax is sent. Respectively communication systems have also been divided to quantity and instant communicating. *Quantity communicating* takes place when a communication process takes time and leaves a mark. For example, transferring an object to another place is an act of quantity communicating. On the other hand in *instant communicating* message is being communicated quickly and disappears unless it is being separately recorded.<sup>245</sup> Shannon’s mathematical theory of communication may be used to depict a communication system for instant communicating.<sup>246</sup>

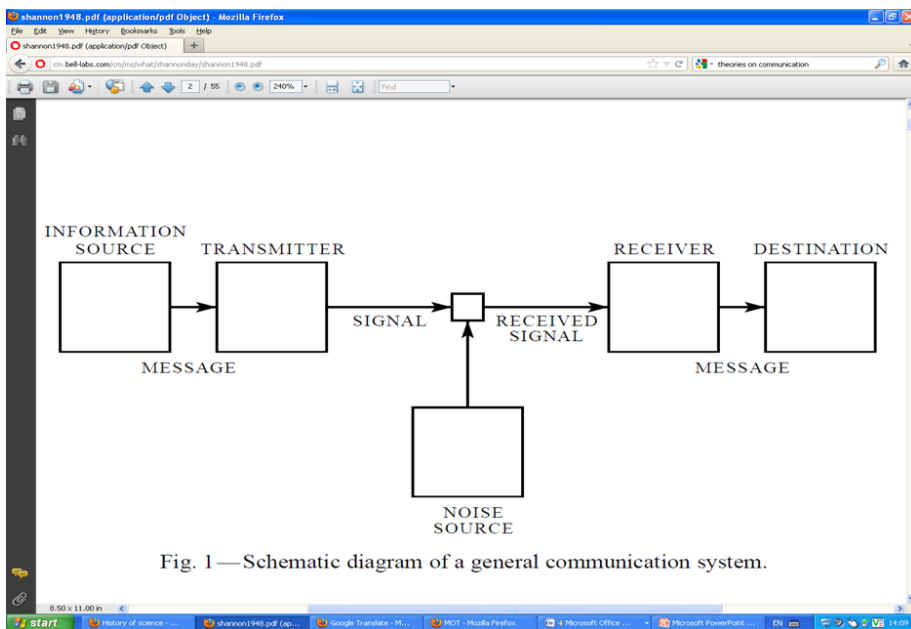
242 WIPO Intellectual Property Handbook: Policy, Law and Use, chapter 2.162, <http://www.wipo.int/about-ip/en/iprm/pdf/ch2.pdf>. According Fiske all cultures would die without communication. John Fiske, Merkkien Kieli, Johdatus viestinnän tutkimiseen, Gummerus Kirjapaino Oy, Jyväskylä 1993 (Original: Introduction to Communication Studies), p. 13 – 14. About the connection of culture and new systems of communication in general see also e.g. Castells, p. 405.

243 See also Article 8 of the WIPO Copyright Treaty (as adopted in Geneva on December 20 1996), which is titled as “Right of Communication to the Public”.

244 It is evident that the comparison must be conducted on a rather general level as communicational research is completely different field of research than legal sciences.

245 Osmo A. Wiio, Johdatus viestintään, 6.-8. painos, WSOY Kirjapainoyksikkö, Porvoo 1998 (hereafter Wiio), p.13. One could also translate the communication systems to slow and rapid messaging. (Quantity and instant messaging are translated from Finnish words “kesto- ja pikaviestintä”).

246 See e.g. C. E. Shannon, A Mathematical Theory of Communication, a reprint with corrections from The Bell System Technical Journal, Vol. 27, pp. 379 – 423, 623 – 656, July, October, 1948 (hereafter Shannon), p. 2. Available at: <http://cm.bell-labs.com/cm/ms/what/shannonday/shannon1948.pdf>.



**Picture 2.** Shannon's Schematic diagram of a general communication system

When comparing the result of Shannon's research to the concept of reproduction one sees that always when content is being communicated to another platform it is by definition also being copied. In other words a successful communication process is also an act of reproduction. This may also be seen directly e.g. from terminology used by Shannon as he states that: "The fundamental problem of communication is that of *reproducing* at one point either exactly or approximately a message selected at another point."<sup>247</sup> Correspondingly e.g. a Finnish Committee Report 1953:5 states that an act of reproduction takes place when a work is being *transmitted* to a device that may be used for its reproduction.<sup>248</sup> Common to both approaches also is that communicating content always necessitates possessing a copy from where the communication process begins. Therefore focusing merely on platforms is irrelevant from the viewpoint of copyright: only distributing those platforms or communicating content the platforms contain may have relevance for the right holder.<sup>249</sup>

This may be illustrated though an example: it is irrelevant for a right holder from an economic perspective how many platforms containing content – traditionally copies – someone produces of a certain content as only the producer suffers the time and costs of producing them.

There may be economical effects for the right holder only if the copies/

<sup>247</sup> Shannon, p. 1 (emphasis added).

<sup>248</sup> Committee Report 1953:5 ehdotus laiksi tekijänoikeudesta kirjallisiin ja taiteellisiin teoksiin, p. 47. Thus according to the Committee Report 1953:5 an act of reproduction takes place if a work is being transmitted to a platform where it may be repeated (i.e. copied/transmitted again).

<sup>249</sup> However, an exception to this rule is that the very first platform on which the content exists is relevant: if a certain piece of content is on no platform, it is questionable whether it exists at all.

platforms are distributed (“quantity communicated”) or content they contain is otherwise being (“instantly”) communicated to other persons. In other words, if you produce 10.000 copies of a Harry Potter book, no harm yet has occurred to the right holder(s) of the books. Only you have suffered the costs of production. Economics of the right holders may be affected only if you start distributing those copies or otherwise communicating content the platforms contain.

Consequently, it seems that we may understand all the economic rights provided by copyright as rights to communicate content in some way. Moreover, all of the economic rights of right holders seem also to belong under the category of instant communicating, except distributing copies, which is a form of quantity communicating. For these reasons, it is difficult to see that considering copyright generally as a right to communicate content would limit exclusive rights of right holders. However, doing so would provide clearer way to comprehend essence of economic rights of authors as the approach would enable us to disregard random copies that are being produced during communication processes. It would also allow us to focus on the person who is the communicator i.e. user.

However, regardless of whether we accept the referred “communicational approach”, a prosumer still needs permission at least for making content available to the public. Whether there are applicable limitations relieving prosumers from the need to ask permissions as it pertains to use of content on the Internet shall be examined next.

## **4.7 LIMITATIONS TO THE RIGHT TO MAKE CONTENT AVAILABLE TO THE PUBLIC**

### **4.7.1. IN GENERAL**

All international conventions and treaties on copyright contain provisions for limiting economic rights of right holders.<sup>250</sup> Consequently, this chapter evaluates those limitations of the Infosoc directive that might be considered plausible for prosumers (i.e. natural private persons not acting for commercial purposes) to produce copies and make content available to the public on the Internet. However, as Article 5.2(b) of the Infosoc directive entitles prosumers to produce private copies

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250 See e.g. Articles 9 – 10bis of the Berne Convention, Article 13 of the GATT Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Article 10 of the WIPO Copyright Treaty, Article 15 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) and Article 16 of the WIPO Performances and Phonograms Treaty (WPPT). In more detail see e.g. *Papadopoulos*, M.D., Copyright Limitations and Exceptions in an E-Education Environment, in *European Journal of Law and Technology*, Vol. 1, Issue 2, 2010 (hereafter *Papadopoulos*), p. 8–19.

against compensations for right holders<sup>251</sup>, focus of the analysis is on usage forms related to making content available to the public on the Internet.<sup>252</sup>

At this point it should also be noted that in Europe Infosoc Directive contains an exhaustive list of limitations. This means that member states are not allowed to enact limitations if they have not been listed. If they are listed it is up to member states to decide whether they implement limitations as provided in article 5 of the Infosoc directive.<sup>253</sup> However, an exhaustive list of limitations is problematic because, just as copyright may evolve, *also society and scope of other fundamental rights necessitating a limitation to copyright may evolve*. As explained, reciprocal nature of fundamental rights does not acknowledge a possibility to define or “lock-in” the scope of other rights from the viewpoint of one right. For example, regarding the right to science and culture General Comment 21, paragraph 10 specifically states that “Various definitions of “culture” have been postulated in the past and others may arise in the future.” Therefore an exhaustive list for possible limitations is problematic from the viewpoint of fundamental rights. Consequently validity of exhaustive set of limitations may be put under question from the viewpoint of fundamental rights analysis. In fact an exhaustive list for limitations indicates that only little, if any, weigh have been given fundamental rights analysis when the Infosoc directive was drafted.<sup>254</sup> Provided copyright legislations primarily protect business interests instead of individual authors as the situation would mean that traditional content industry wants to keep the world as it was before the Internet/emergence of information society. Thus it is understandable also from the viewpoint of fundamental rights when Bernt Hugenholtz states “Why the Copyright Directive is Unimportant, and Possibly Invalid”.<sup>255</sup>

#### 4.7.2. LIMITATIONS AVAILABLE FOR PROSUMERS FOR USE OF CONTENT ON THE INTERNET

Before evaluating limitations provided by the Infoc-directive it could be mentioned that also the Berne Convention for the Protection of Literary and Artistic Works

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251 In theory Article 5(1) of the Infosoc directive exempts also copies produced by prosumers. However, as explained, it is unclear to what extent prosumers may invoke it.

252 It should also be mentioned that it may be argued that all of the limitations do not apply if the used expression is from an illegal source. As the relevance of the “illegal source” argument is evaluated later in chapter 11, its relevance shall not be examined in this chapter.

253 As the list is exhaustive limitations outside the list are not allowed unless they already existed under national law and have a minor importance for analogue (i.e. not digital) uses and do not affect the free circulation of goods and services within the community. See also Papadopoulou, p. 16.

254 ECHR has been critical towards set inflexible limitations. See e.g. *Phinikaridou v. Cyprus*, no 23890/2, section 62, 20.12.2007 and *Backlund v. Finland*, no 36498/05, sections 45 – 46, 6.7.2010. In both cases the ECHR has been critical towards strict time periods without possibilities to give weigh to other possible relevant factors.

255 See Bernt Hugenholtz *Why the Copyright Directive is Unimportant, and Possibly Invalid*, Published in [2000] *EIPR* 11, p. 501-502, available at: <http://www.ivir.nl/publications/hughenholtz/opinion-EIPR.html>.



contains articles providing limitations. However, as the Infosoc-directive provides an exhaustive list of limitations, only its limitations shall be evaluated here.

When we evaluate the scope of copyright from the viewpoint of the right to science and culture it should first be noted that the right to make content available concerns activities directed to *public*. Thus private acts of making content available do not belong under the scope of the right, which means that prosumers are allowed to communicate content with each other privately. This is positive when we evaluate possibilities to fulfill the right to science and culture. Another thing is that it is difficult to give exact estimations how large group would be considered as non-public. It is often stated that in general public is present if the target audience has not been determined in advance and in theory anyone may participate an event where the expression is used.<sup>256</sup> Thus it is clear that posting a piece of content on Internet openly available for everyone is making it available to the public in a manner, which necessitates permission from a right holder. Therefore, from the viewpoint of information networks a non-public sphere could only be a closed network with limited (pre-determined) attendance. *Consequently, it should first be noted that as the right to science and culture is not limited to closed environments, as a counter balance to the rights of authors the right to science and culture is always in conflict with copyright in open networks unless specific limitations enabling use are found.*

When evaluating limitations more concretely, a prosumers perspective a possibility to make citations as provided by Article 5.3(a)(d) (or in paragraphs 22 and 25 of the Finnish Copyright Act) seem to apply for Internet use. They provide a technology neutral right applying to all content types.<sup>257</sup> In general, requirements for citing is that cited content has been made lawfully available to the public, the citation is made in accordance with good manners and that there is an appropriate connection between the cited work and new work.<sup>258</sup> A challenge related to citing is the lack of precise boundaries as almost any expression – perhaps even one word – may be regarded as a protectable content. It is not either always clear when the preconditions for their use are fulfilled. Nevertheless, applying the limitation for citing does not seem to cause many problems in practice. However, it would be a rather brave interpretation to claim that a right to take a citations would allow making content available to the public on a larger scale (e.g. for sharing music on the Internet). Consequently, in this respect the right to make citations is rather narrow in relation to the right to science and culture.

Article 5.3(f) of the Infosoc directive allows use of political speeches and extracts of public lectures or similar expressions to the extent justified by the informatory

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256 About citing in Finland see e.g. *Haarmann*, p. 188 – 193 and 205 – 206 and Kristiina *Harenko*, Valtteri *Niiranen* ja Pekka *Tarkela*, *Tekijänoikeus, kommentaari ja käsikirja*, Helsinki 2006 (hereafter *Harenko, Niiranen and Tarkela*), p. 35 ff.

257 About citing in Finland see e.g. *Haarmann*, p. 188 – 193 and 205 – 206 and *Harenko, Niiranen and Tarkela*, p. 172 – 181 and 185 – 189. One could argue that in theory use of content through citing and other limitations listed below always in theory requires copying the expression to the extent it is used.

258 However, according to some, citations should not be allowed for the purposes of advertising.

purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible. As the limitation (excluding political speeches) is limited to "extracts" of expressions, we may see that its applicability is also rather narrow in relation to the right to science and culture.

Article 5.3(i) of the Infosoc directive allows incidental inclusion of a work or other subject-matter in other material. It may be asked whether this limitation could enable prosumers to use e.g. music on their home-made videos made available on the Internet. However, the word "incidental" implies that use of an expression should not be purposeful. Even if more liberal interpretation is accepted, it is difficult to see that Article 5.3(i) could provide a much wider possibilities to use than the right to take quotations.

Finally, Article 5.3(k) Infosoc directive allows use of expressions for the purpose of caricature, parody or pastiche. This limitation provides an extensive limitation also for prosumers to use content. However, the limitation does not enable prosumers to use content in their original form and consequently does not provide a substitute for a license.

Therefore, when we evaluate possibilities to use content as provided by the right to science and culture we may see that the Infosoc directive provides only rather limited ways for prosumers to use expressions in their original form on the Internet. Consequently it is difficult to see that exemptions and limitations to copyright could substitute a need for license in order to make content available on the Internet, especially if a prosumer or a user prefers to use content more comprehensively.

## 4.8 CONCLUDING REMARKS

According to the above analysis, at the core of individualistic *droit d'auteur* copyright theory is protecting essential economic interests of individual authors creating expressions. Provided exclusive rights are granted to authors for administering their expressions, authors should secure their basic material interests through individual transactions with users/prosumers. If concluding these transactions is not possible, copyright system based on exclusive rights is not functional as authors are unable to secure their basic material interests.

In this respect, applying the right of reproduction to Internet is challenging as it is problematic to pinpoint each copy on the Internet possibly necessitating permission from a right holder. This at least in theory questions functionality of exclusive based copyright system on the Internet regarding the right of reproduction.<sup>259</sup>

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<sup>259</sup> To the extent producing private copies is allowed compensations of these copies are distributed to authors the result is positive from the viewpoint of the Articles 27 of the UDHR and 15 of the ICESCR: prosumers are able to use and authors are entitled to obtain compensations. Another thing is that it is difficult to rigorously evaluate whose content is being copied by whom.

Consequently, it was suggested that all exclusive rights of authors could be seen as rights to communicate content without limiting current copyright system.

However, the situation is problematic also from the viewpoint of the right to make content available to the public as offered limitations for prosumers in this respect are rather narrow. The right to science and culture is not narrowed to closed environments/groups and consequently it is difficult to see that already existing limitations to make content available to the public could secure the protected core area of the right to science and culture. In other words when we evaluate possible usage situations from the viewpoint of right to science and culture as provided by Article 27(1) of the UDHR and 15(1)(a) of the ICESCR, limitations enacted to Infosoc directive seem deficient. Most likely the right to science and culture has had little, if any, weight when copyright laws have been drafted. In fact an exhaustive list of limitations implies fundamental rights analysis has had very little if any role when the Infosoc directive has been drafted. This is problematic as fundamental rights are seen as prerequisites for democracy and e.g. according to the Finnish Constitution every constitutional right has a core area protecting certain activities that cannot be criminalized.<sup>260</sup> Thus it may be asked how we should take into consideration the right to science and culture when compared to exclusive rights granted to individual authors from a fundamental right perspective?

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260 In this respect see also Constitutional Law Committee 23/1997, vp, p. 2. See also See Sakari *Melander*, *Kriminalisointiteoria – rangaistavaksi säätämisen oikeudelliset rajoitukset*, Suomalaisen lakimiesyhdistyksen julkaisuja, A-Sarja N:o 288, a doctoral dissertation. Vammala 2008 (hereafter Melander), p. 302 ff.

## 5 COMPARING CORE AREAS OF RIGHTS OF AUTHORS TO THE RIGHT TO SCIENCE AND CULTURE

### 5.1. A BASIC PREREQUISITE RELATED TO FUNCTIONALITY OF COPYRIGHT SYSTEM BASED ON EXCLUSIVE RIGHTS

If one attempts to secure the basic material interests of authors through a system based on exclusive rights, certain minimum requirements must be met in order for the system to be functional. A clear requirement for securing the basic material interests of individual authors through a property right is the possibility to conclude individual transactions regarding use of the property. If concluding transactions between authors and prosumers is not possible, an author cannot expect to obtain any compensation for the use of exclusive rights.<sup>261</sup> This may also be seen from the European Convention on Human Rights, which does not extend its scope to possible future property<sup>262</sup> – i.e. in terms of copyright to possible future transactions. It is difficult to see why this precondition should not apply also to unpublished works, as they are also worthless in economic terms if an author is unable to conclude transactions concerning their use.

However, the inability to conclude transactions does not directly endanger the right to science and culture. Indeed, using content as granted by the right to science and culture is possible even if concluding transactions with a right holder is not. In other words, it is difficult to see that one could endanger (not to mention “annul” through criminalization) the existing right to science and culture on the grounds that it is not possible to fulfill rights of authors.<sup>263</sup> In such situations, prosumers would have only one possible role: criminals. Therefore, if fulfilling the right to science and culture were denied in cases when it is not possible to conclude transactions

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261 This should apply also to Anglo-American copyright system. See e.g. Wendy J. Gordon, Fair Use as Market Failure: a Structural and Economical Analysis of the Betamax Case and Its Predecessors, *Columbia Law Review*, December, 1982, Under B. An Overview of the Market Model: “1. The Market System. Economists in the tradition of Adam Smith defend our society’s primary dependence on markets by arguing that individual transactions in the marketplace serve both social needs and the needs of the individual persons participating.” It could also be mentioned that if one creates content merely for one’s own amusement without even an intention to conclude transactions, there is no need to grant economic rights to authors.

262 See *Pellonpää I* and and Matti *Pellonpää*, *Euroopan Ihmisoikeussopimus*, Jyväskylä 2000, p. 479 ff with referred case law.

263 It could also be mentioned that it is difficult to maintain an idea we should have rights that are impossible to fulfill. See also Juha *Pöyhönen* (nowadays Karhu), *Sopimusoikeuden järjestelmä ja sopimusten sovittelu*, Suomalaisen Lakimiesyhdistyksen julkaisuja A-sarja N:o 179, Vammala 1988, p. 4.

with a right holder, *the result would endanger both the rights of authors and the right to science and culture at the same time*, thereby “maximizing misery”.

However, as fundamental rights are interrelated – such as the tension between subsections 1 and 2 of the UDHR – why does the inability to conclude individual transactions not also endanger the right to science and culture, if concluding individual transactions is not possible? In theory, the question is relevant given the assumption that there would be fewer expressions to use if the essential economic interests of authors were not secured. This would obviously be the case if concluding transactions were not possible in a system based on exclusive rights. Fewer existing expressions to use would thus have indirect negative effects on the right to culture and science.<sup>264</sup>

In this respect, it should be noted that the problem related to applying exclusive rights of authors already exists if concluding transactions is not possible. Therefore, the above analysis does not mean that fulfilling basic material interests of authors should be disrespected if concluding individual transactions is not possible. On the contrary, states are obligated to secure basic material interests of authors just as they must defend the right to science and culture. *Instead, the above analysis merely means that in situations when it is not possible to conclude transactions, it is questionable whether a system based on exclusive rights for securing the basic material interests of authors is functional.* In other words, in cases where concluding individual transactions is not possible, the legislature should use means other than exclusive rights for securing essential economic interests of authors. Whatever means are employed, they should not endanger the fundamental rights of others. For this reason, it is suggested herein that cases in which concluding transactions is not possible clearly justify limitations or even exemptions to copyright protection.<sup>265</sup> This is consistent with the history and practices of copyright law. For example, the exemption enacted in Article 5(1) of the Infosoc Directive exempted copies from copyright in cases where it is not practicable to monitor and conclude necessary transactions regarding their use.<sup>266</sup> Collective licenses, which traditionally have been seen as limitations, have also been introduced in situations when it has been regarded impossible for individual authors to conclude transactions individually. It should also be emphasized that limiting copyright in situations when concluding individual transactions is not possible should not hurt authors; they cannot otherwise expect to obtain compensations in such cases. From a courts perspective, this approach would emphasize analysing whether a users fundamental rights are endangered

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<sup>264</sup> It should be noted that expressions to use would always exist even if no copyright laws existed.

<sup>265</sup> This does not prevent granting exclusive rights back to authors in cases when concluding individual transactions becomes possible again.

<sup>266</sup> The formal justification for the Article 5(1) is in short to enable normal communication processes on the Internet, but in practice the problem is caused by the fact that no-one can supervise and conclude appropriate transactions regarding each produced copy on the Internet i.e. enable communication processes through individual transactions. If this was possible, there would be no need for the exemption.

due to impossibility to obtain licenses on a case-by-case basis. The next question to be examined is the reciprocal relationship between rights of authors and prosumers when concluding transactions is possible.

In practice the right to science and culture has been largely neglected. The most recent example may be read from the EU Directive (2012/28/EU) on certain permitted uses of orphan works (Orphan Works Directive).<sup>267</sup> The Orphan Works Directive attempts to alleviate using works whose right holders cannot be identified or located.<sup>268</sup> It is clear that it is not possible to conclude transactions regarding use of works whose owners are unknown. However, also the Orphan works directive starts from the starting point of all rights reserved, completely neglecting the right to science and culture. It maintains exclusive rights beyond rationalism as it applies only published works or works that have been otherwise placed publicly available (e.g. by means of broadcasting). This means that unpublished works whose right holders cannot be found shall stay behind closed doors in theory for eternity. It is difficult to see who benefits from disallowing access to cultural or scientific content which may even be major scientific contributions or significant musical compositions. Such a result does not advance rights of users or the economic interests of the author.<sup>269</sup> The analysis presented in this book acknowledging the right to science and culture suggests that copyright should be clearly limited as it pertains to orphan works given that concluding relevant transactions regarding their use is impossible. Furthermore, if an author of an orphan work reappears and claims rights to it, it would then be possible to conclude transactions.<sup>270</sup>

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267 See Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012, on certain permitted uses of orphan works (hereafter Orphan works directive).

268 Article 2 of the Orphan works directive states that "A work or a phonogram shall be considered an orphan work if none of the right holders in that work or phonogram is identified or, even if one or more of them is identified, none is located..."

269 If copyright exists primarily in order to benefit industries, maintaining a black and white starting point would benefit them as a mean to maintain an illusion through law that rights of authors must always be protected "for ideological reasons". However, such an answer, of course, has directly nothing to do with protecting basic material interests of authors or the right to science and culture.

270 If an author would reappear and claim rights to an expression, concluding transaction regarding its use would become possible indicating that exclusive rights would again apply. It could also be decided that the authors is entitled to obtain compensations for the use during the time period s/he was missing as such a decision would benefit also his/her economical interests. It is of course possible that the author disapproves the use because of e.g. privacy reasons. However, such a justification does not aim to secure the authors basic material interests i.e. economical rights.

## 5.2. ECONOMIC RIGHTS OF AUTHORS AND THE RIGHT TO SCIENCE AND CULTURE

### 5.2.1. PRELIMINARY REMARKS

As the right to science and culture has both theoretical and judicial support, its existence is accepted in this dissertation. As opposed to the rights of authors, the right to science and culture entitles using complete works. This may also be read from the General Comment 21, which states that it consists “... of effective and concrete opportunities for individuals and communities to enjoy culture *fully*...”<sup>271</sup> and contains “the right to seek, receive and impart information and ideas *of all kinds and forms including art forms*...”<sup>272</sup> and creates a minimum core obligation for State Parties to “... eliminate *any barriers or obstacles* that inhibit or restrict a person’s access to the person’s own culture or to other cultures, without discrimination and without consideration for frontiers of any kind”<sup>273</sup> Although we would narrow down the core area of the right to science and culture to limited amounts of works, this core area is still in direct conflict with copyright theory based on exclusive rights.

Because property and human rights should not be equated, it may be asked whether it is theoretically rational to compare property rights to the right to science and culture as provided in the Article 27(1) of the UDHR and 15(1)(a) of the ICESCR. As explained, the situation should rather be the opposite.<sup>274</sup> If this is nevertheless done and property is seen as a neutral “tool” having fundamental value in itself (as opposed to a right protecting certain essential/basic interests as the fundamental rights approach postulates), it would mean that one should give economic value to other fundamental rights when weighed with property right. Or, if property has always been seen as a right outweighing the competing right, it would mean that a prosumer is entitled to enjoy his/her right to science and culture only if an author gives his/her permission first even if the condition was to pay negligible compensation. If no permission is asked, it could be argued that acting as provided by the right to science and culture is a crime (“stealing”). However, this is what seems to be the situation in contemporary exclusive based copyright approach on the internet. Exclusive rights seem to have been considered “above” the right to science and culture. If no copyright limitation applies, this is problematic as it criminalizes core areas of the right to science and culture. One could attempt to argue that the problem is merely theoretical if reasonably priced licenses are being offered to

271 See under “Elements of the right to take part in cultural life” in paragraph 16(b) of the General Comment 21 (emphasis added).

272 See under “Specific obligations” in paragraph 49(b) of the General Comment 21 (emphasis added).

273 See under “Core obligations” in paragraph 55(d) of the General Comment 21 (emphasis added).

274 See e.g. here chapter 4.1. and General Comment 17, paragraph 1: “Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.”

prosumers. At first this argument sounds plausible. However, it would still mean that we would be putting a price – even if a reasonable one – on the fundamental rights to science and culture and it is difficult to find justifications allowing us to value fundamental rights in economic terms.<sup>275</sup> This is the main theoretical challenge when we start comparing the relationship between the right to science and culture with exclusive rights of authors. The possibility that distinguishing between published and unpublished expressions could provide guidelines to the dilemma shall be evaluated next.

If the concept of property is not evaluated as a right protecting certain essential/basic interests as the fundamental rights approach postulates, but instead is seen as a neutral “tool” having fundamental value in itself there would be no lower limit for damages that may be considered to have violated property as a fundamental right. Indeed, even damages as little as 0,0001 euro would represent violation of property as a fundamental right. Unless other fundamental rights were given monetary value, this would mean that all other fundamental rights would be secondary to this objective and economically worthless.

## **5.2.2. ESSENTIAL ECONOMIC INTERESTS AND RELEVANCE OF PUBLISHING AN EXPRESSION**

If concluding transactions is possible, it may be argued that unpublished works of individual authors are at the core of copyright. However, in an author–prosumer relationship, the protection is theoretically also in conflict with the right to use expressions as provided by the right to culture and science. Thus, it may be wondered which right should prevail in a conflict regarding the use of unpublished works.

It would seem reasonable to conclude that taking an unpublished work from an authors’s desk drawer would clearly be in conflict with the core area of author’s exclusive property right; it would clearly be stealing. However, when we evaluate copyright as a *legal right* to administer use of content in comparison to traditional property, the interpretation may be challenged. For example, if the work is merely copied so that the author still has the original piece in his/her desk drawer, the analogy to traditional stealing becomes problematic. In fact, it may be even asked what the economical damage would be for the author, if s/he had no intention of using that particular expression to secure his/her essential material interests as economic rights postulate?

The situation depicts the challenges that have been connected to copyright as non-rivalrous and non-excludable goods.<sup>276</sup> In other words,

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<sup>275</sup> From a practical viewpoint functionality of such system requires that the parties are more or less in an equal position.

<sup>276</sup> For example *Santos* has stated the following, “the fact that intellectual property deals with non-rivalrous and non-



when e.g. Article 1 of Protocol 1 in the ECHR entitles everyone “peaceful enjoyment of his possessions” the problem in relation to copyright is that a right holder is able to peacefully enjoy his/her possessions even if someone has copied his/her expression.<sup>277</sup> This implies how copyright resembles a business model instead of traditional property objects. Thus when the legislators attempt to limit possibilities to use non-excludable goods by making them excludable through exclusive rights, the attempt creates an artificial legal barrier, which is often maintained by making analogies to traditional goods such as apples, buffets etc. These analogies are problematic because, opposite to traditional goods, the *amount of copyrighted goods merely increases the more they are enjoyed* (copied).<sup>278</sup> For this reason, the Internet as an open environment produces a challenge for granting digital products economic value. After the first product has been produced, the price of the subsequent digital products is essentially zero.

It is true that publishing an expression often implies that the author has less need for protection as publishing an expression indicates that his/her economic interests may have been secured through the publication itself.<sup>279</sup> However, even if this occasionally might be the case, publishing an expression does not yet tell us whether essential economic interests of the author have been secured or not. Therefore, keeping in mind the aim of fundamental rights to secure certain essential rights (i.e. “essential foodstuffs”, “essential primary health care”, “basic shelter and housing”) it may be asked why publishing an expression should have much relevance in the decision making when this evaluation is conducted.

Another concern is that communicating a private expression, e.g. an unpublished letter, may violate its author’s (and possibly receiver’s) privacy. If this is the case, the right to science and culture should be compared to the right to the right of privacy, not to economic rights aiming to secure author’s essential interests.<sup>280</sup>

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excludable goods poses some insurmountable problems to its assimilation into a strictly Lockean philosophy. Human rights approaches to intellectual property that assume that the latter should be regarded as a human right *qua* property are fatally wounded because they rely on a defective analogy, confusing the tangible goods in which the intellectual work is embodied with the intangible goods themselves.” See Ana Eduarda Santos, *Rebalancing Intellectual Property In The Information Society: The Human Rights Approach*, Cornell Law School Inter-University Graduate, Conferences, Lectures, and Workshops, Student Conference Papers, 4-1-2011, p. 5. Available at: [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1075&context=lps\\_clap](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1075&context=lps_clap).

277 ee also Santos: “This is language that is strange to the intellectual property field, and with good reason: the analogy between property *stricto sensu* and intangible property may be helpful to understand certain problems, but it is certainly not accurate. Intellectual property rights were not created to promote “peaceful enjoyment” of works or inventions...” Santos, p. 12.

278 According to Geiger copyright “concerns property *of a special kind*”. See Geiger, p. 105 (emphasis original).

279 In this respect it is e.g. understandable that traditionally protection provided by copyright has weakened after the expression has been published. For example, certain limitations start applying to expressions after their publication.

280 Similarly it would be difficult to invoke copyright protection in order e.g. to prevent giving an unpublished letter to a police, if the letter reveals a serious crime. Although in this example other rights/values but the right to science and culture

If no relevance is given to the possibility of prior publication, we evaluate copyright purely as a right aiming to secure basic material (economic) interests of authors. From this point of view, it may be argued that the right to science and culture should prevail over copyright, if the author's essential economic rights are secured. In such cases, the author is simply no longer in need of fundamental rights protection and would not be covered by the protected core area of author's rights. On the other hand, if the author's essential economic interests were endangered, rights of authors should prevail over the right to science and culture.

Consequently, comparing the right to science and culture to rights of authors as a securer of certain essential economic rights would mean that the economic position of authors should be evaluated on a case-by-case basis when content is being used. The practical challenge of this approach is that a prosumer should then know whether the author's basic material interests have been previously secured or not and whether the use will harm or benefit<sup>281</sup> the author's economic position. At first this approach may also sound like hairsplitting.<sup>282</sup> However, considering the traditional formal copyright approach, it would not be revolutionary at all. As explained, we may already rigorously evaluate whether few – or even one – word expressions exceed the required threshold for copyright protection or whether an expression in bit form has been copied to a certain platform or not. Therefore, although certain practical challenges in this respect exist, evaluating whether a certain use endangers right holders' essential economic interests on a case-by-case basis could be considered an option to solve the relationship between the right to culture and science and rights of authors. A simple solution could be that the non-commercial use of singular expressions (such as short phrases or everyday photographs) could be considered exempted from copyright due to the right to science and culture and the special nature of copyright as property especially in cases when it is obvious that the author has no intentions to use the expression in order to secure his/her economical rights.

### 5.3. CONCLUDING REMARKS

The analysis in this chapter indicates that it is challenging to fulfill basic material interests of authors through exclusive rights in an author–prosumer relationship when the right to science and culture is taken into consideration. It is difficult to see that one could deny a prosumer from enjoying his/her right to science and culture

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would provide justification for using the content.

281 For example, through net work effects.

282 Obtaining such information may be occasionally easy (e.g. if the author is an international multimillionaire rock-star), but often obtaining relevant information regarding the authors economic situation at the time of use would be difficult if not impossible. Similarly it would be difficult to pre-assess how a particular use influenced economic position of a particular author.

in cases where concluding individual transactions with authors is not practicable. Institutions “maximize misery” when they allow situations in which authors are unable to receive compensation and prosumers are unable to use content, as in such cases both rights of authors and prosumers are endangered at the same time. It is also theoretically problematic to require a prosumer to request permission to enjoy his/her fundamental rights to science and culture as in such situation property right is always posited above the prosumers right to science and culture.

Making analogous comparisons between copyright and traditional goods as property is also challenging. How could an author be deprived of his/her right “to peacefully enjoy his property” when someone makes a copy of it? S/he is still able to “peacefully enjoy his property”. It may also be asked whether it is plausible to grant fundamental rights protection to an author if his/her essential economic interests have already been fulfilled or if the author does not have any intentions to use a certain piece of work in order to secure his/her essential economical interests? Furthermore, it is challenging for a prosumer to predetermine whether their use of content hurts or promotes the economic position of the author.

These challenges indicate that if the essential economic interests of authors are being endangered, e.g. due to use of content by prosumers on the Internet, exclusive rights should not be considered when developing a solution for protecting the rights of authors and prosumers. However, the described concerns are obviously unnecessary, or at least diminished, if authors and prosumers constantly conclude individual transactions with each other, i.e. ,the system functions as postulated regardless of the aforementioned challenges. Thus, the next chapter evaluates the extent to which it is rational to assume that individual authors and prosumers might conclude individual transactions with each other.

## 6 REGARDING PRACTICAL POSSIBILITIES TO CONCLUDE TRANSACTIONS BETWEEN INDIVIDUAL AUTHORS AND PROSUMERS ON THE INTERNET

### 6.1. IN GENERAL

This chapter evaluates possibilities of authors and prosumers to conclude individual transactions with each other in order to make content available to the public on the Internet. The evaluation is worthwhile to conduct when we take into consideration that already before Internet it has been in certain cases postulated impossible to administer use of rights individually. For example, for that reason platform fee/levy system was introduced.<sup>283</sup> Some may think that evaluating possibilities to conclude direct transactions between individual authors and prosumers as an uninteresting theoretical analysis. However, arguing individual administration of rights is theory is close to arguing individualistic – especially *droit d’auteur* – copyright as theory. Especially fundamental rights see copyright as a mean to secure essential interests of authors and if exclusive rights are been used to secure this aim, transactions should be concluded in order to accomplish the task.

Thus as exclusive rights are applied when content is used on the Internet, one could assume that obtaining permissions for using content on the Internet is easier than obtaining permissions for producing private copies. In order to evaluate whether these types of assumptions are rational, this chapter evaluates possibilities to conclude transactions from four different viewpoints. Firstly, although an exclusive right to communicate content to the public exists, in cases where content has been posted and is openly available on the Internet with the consent of the right holder, it may be asked if the use of this content should be considered allowed through an implied license. Secondly, the use of freer licenses, such as Creative Commons/ Open content licenses has increased. To a large extent the owner of a freer license waives his/her exclusive rights, thereby enabling the use of his/her content. Thus, their relevance as suitable solutions for concluding transactions shall be evaluated.

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283 See e.g. Prof. P. Bernt Hugenholtz, Dr Lucie Guibault and Sjoerd van Geffen The Future of Levies in the Digital Environment, Institute for Information Law 2003 (hereafter *Hugenholtz, Guibault and van Geffen*), p. 10 and 12. See also e.g. Committee Report 1974:21, Pohjoismaiden tekijänoikeuden tarkistamiskomitean mietintö osa I, Valokopiointi ja nauhoitus erityisesti opetus toiminnan piirissä, Helsinki 1974 and Committee Report 1982:63, Tekijänoikeuskomitean II osamietintö, Korvaus yksityisestä ääni- ja kuvanauhoitustoiminnasta, Tekijänoikeudellinen väliliesmenettely, Tekijänoikeusneuvosto, Helsinki 1982.

Thirdly, technological convergence and rules regulating transfer of rights may also have relevance regarding licensing possibilities given that theoretically each used technology requires a separate permission from a right holder. In this respect, the Internet forms a unique platform and for this reason applicability of rules regarding transfer of rights shall be compared to technological convergence. Finally, if a user needs a license to copy and communicate content (as is always the case provided no exemption or limitation applies), practical possibilities to conclude necessary individual transactions shall be evaluated on a general level.

## 6.2. USE OF CONTENT FREELY AVAILABLE ON THE INTERNET

If content has been posted and is openly available on the Internet, as an open network, with the permission of a right holder, extent to which it is rationale to maintain exclusive rights may be called into question. Why would a right holder require permission to (copy and) communicate the content, if s/he already accepted that it is openly available for everyone? Posting content freely available for everyone forms a certain type of paradox related to applicability of exclusive rights in open environments such as Internet.<sup>284</sup> This paradox may be illustrated when we compare the Internet as an “information superhighway” to traditional publicly accessible streets/highways: it would be incomprehensible to necessitate that a person X walking on a street should beforehand ask permission from person Z in order to receive (“copy”<sup>285</sup>) what Z is expressing on Z’s own initiative. Why would Z demand that X should ask permission from him, if Z voluntarily starts uttering his/her own expressions to X? This is dissimilar to a situation wherein Z attempts to arrange some type of technical barrier (e.g. a DRM-system, a log-in requirement or a fence) as an attempt to prevent anyone from approaching him unless otherwise agreed. In such a case the content would not be coming from an open but from a closed

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284 For example, EU Commissions Declaration on Net Neutrality emphasises »open and neutral character of the Internet. See last page of the Directive 2009/140/EC of the European Parliament and of the Council, of 25 November 2009, amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

285 Similarly as computers, also people copy information through live-debates. For example, according to Wiio approximately 5–9 words are being copied to your short term memory during reading process of this text. Osmo A. Wiio, Information and communication, a conceptual analysis, Department of Communication, Series 1C/1/1996, third and revised edition, p. 21. In more detail the physical reproduction process in your head may be described in words of Matt Ridley: “Right now, somewhere in your head, a gene is switching on, so that a series of proteins can go to work altering the synapses between brain cells so that you will, perhaps, forever associate reading this paragraph with the smell of coffee seeping in from the kitchen...” Matt Ridley, *Nature Via Nurture. Genes, experience and what makes us human*. Harper Perennial 2004, s. 181. It is clear that necessitating permission for these types of copies would be nonsensical (even if they were produced from an »illegal source») and overblown interpretations of copyright. However, as in copyright literature one has evaluated in very detail when a copy has been being formed on a computers monitor, RAM-memory and other similar platforms, the examples may be used in this in order to depict theoretical problems related to situations when one attempts literally apply exclusive rights in an open environment.

system, contradicting the idea of the Internet as an open network or a street as an openly accessible area.

In fact, this questions the rationality of applying exclusive rights to open environments. Thus, if content is openly available to everybody, it may be assumed that the right holder must have implicitly accepted that it may also be used to some extent. In this respect, possible notifications on the web-page or other context may provide information. However, if no general implied license doctrine exists (as is the case in Finland), one should evaluate the extent to which the right holder had implicitly allowed the use, leaving the situation open for case-wise interpretation. Thus, in this respect one may only recommend an interpretation. For example, it could be suggested that a right holder has consented to communicating his/her content at least for non-commercial purposes, if the content has been posted openly available for everybody with the right holders consent. Any information or circumstantial factor indicating another direction would repeal the presumption. However, it should be noted that one problem related to this approach would be that it would apply only to content posted on the internet with the permission of the right holder. Often a prosumer cannot know whether a certain piece of content has been placed on line with right holder's permission. Therefore, as long as no doctrine for implied licensing exists, it is difficult to provide clear answers regarding the use of openly available content.

### 6.3. RELEVANCE OF FREER LICENSING

Fewer questions exist in relation to the use of content licensed under freer licenses. Freer licenses provide individual authors and prosumers the possibility to grant and obtain licenses from each other. They explicitly state the terms of use and, in principle, freely allow reproducing and making content available and for this reason are well suited to open environments.<sup>286</sup> Despite the fact that they allow extensive copying and communication of content on the Internet, their use has increased tremendously in recent years.

For example, the use of so-called Creative Commons licenses (shortly CC) has increased in the following way<sup>287</sup>: "CC introduced its first licenses in 2002. An increasing number of websites and content on the

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286 See e.g. *Mikko Välimäki*, Vapaammista kirjallisten ja taiteellisten teosten lisenssiehdoista, Defensor Legis N:o 6/2003, p. 1067.

287 There is no required form for individual licensing, but so called »Creative Commons» (or CC) licensing seem to be most popular way of licensing, especially when artistic and literary documents are being communicated via Internet. See e.g. <http://creativecommons.org> and *Mikko Välimäki*, Vapaammista kirjallisten ja taiteellisten teosten lisenssiehdoista, Defensor Legis 6/2003. In general about Creative Commons licenses, see e.g. *Herkko Hietanen*, *Ville Oksanen*, *Mikko Välimäki*, Community Created Content, Law, Business and Policy. Helsinki 2007, available at: [http://www.turre.com/wp-content/uploads/webkirja\\_koko\\_optimoitu2.pdf](http://www.turre.com/wp-content/uploads/webkirja_koko_optimoitu2.pdf).

Internet use CC licenses. In 2003 search engines indexed one million CC-licensed works. By May 2004, the total number of CC-licensed works had reached three million. In fall 2005 Yahoo indexed over 53 million links that were pointing to CC licenses and just six months later Google's queries for CC-content returned over 140 million pages. The licensed works range from classical music to sci-fi movies and from MIT courses in electronic engineering to governmental reports and publications.<sup>288</sup>

The increase is most likely at least partially due to the paradoxical starting point of copyright, which postulates that exclusive rights should apply also to content that has been posted openly available to everyone. However, for prosumers (and other interested users) the problem related to freer licenses is that only a limited amount of the content is licensed with Creative Commons or similar licenses. On the other hand, from the viewpoint of a closed (traditional) copyright business model, the ability of freer licenses to secure compensations for right holders is obscure due to exclusive rights that have been at least partially waived.<sup>289</sup> Therefore, freer licenses provide only a limited solution regarding the possibilities to use content. Whether rules regarding transfer of rights have an effect to licensing possibilities shall be evaluated next.

## 6.4. RELEVANCE OF TECHNOLOGICAL CONVERGENCE AND RULES REGARDING TRANSFER OF RIGHTS

Concluding transactions, per se, should not be problematic as copyright law acknowledges freedom of contract.<sup>290</sup> However, copyright laws often contain discretionary norms regulating the transfer of rights, which should be taken into consideration when examining licensing possibilities. It is at this point that an author and a prosumer may face challenges when drafting contracts, especially in relation to technological convergence.

288 See Herkko Hietanen's doctoral dissertation: *The Pursuit of Efficient Copyright Licensing, How Some Rights Reserved Attempts to Solve the Problems of All Rights Reserved*. Lappeenranta University of Technology, Digipaino 2008 (hereafter Hietanen) (<https://oa.doria.fi/handle/10024/42778>), p 40. Lawrence Lessig also described the increase of CC-licenses on 18th October 2006 in his is Commoner Letter in the following way: »Within a year, there were more than 1,000,000 link-backs to our licenses (meaning at least a million places on the web where People were linking to our licenses, and presumptively licensing content under those licenses). Within two years, that number was 12,000,000. At the end of our last fundraising campaign, it had grown to about 45,000,000 link-backs to our licenses. That was December, 2005. In the first six months of 2006, that number grew by almost 100,000,000 licenses. In June, we reported about 140,000,000 link-backs to our licenses. We have hit a stride, and more and more of the net marks itself with the freedoms that Creative Commons helps secure.» See Commoner Letter October 18<sup>th</sup> 2006, <http://creativecommons.org/weblog/entry/6106>.

289 About criticism, see e.g. Wikipedia, [http://en.wikipedia.org/wiki/Creative\\_Commons#General\\_criticism](http://en.wikipedia.org/wiki/Creative_Commons#General_criticism), and John C.Dvorak, *Creative Commons Humbug*, PCMAG.com, July 18, 2005, available at: <http://www.pcmag.com/article2/0,2817,1838244,00.asp>.

290 This may be read e.g. from recital 30 of the Infosoc Directive, which states that "The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licenses, without prejudice to the relevant national legislation on copyright and related rights."

Challenges may occur due to discretionary provisions related to the transfer of rights, which commonly exist in the copyright laws of European countries.<sup>291</sup> For simplicity, paragraph 27, subsection 1 of the Finnish Copyright Act shall be used here as an example. It provides that copyright (not including so-called moral rights) may be disposed of in whole or in part.<sup>292</sup> Thus the extensity of transfer of rights may vary considerably as an assignee may obtain only a small license for a certain use or buy all the economic rights.<sup>293</sup> However, questions related to the extent of the transfer may arise as paragraph 2 of the Finnish Copyright Act (similarly as article 2 of the Infosoc-Directive) provides that the exclusive right of reproduction covers “any manner or form.”<sup>294</sup> The norm depicts the technology neutrality in copyright and means that different communication technologies require in theory separate permissions from a right holder.

Due to this norm, problems may occur if new emerging technologies have not been taken into consideration when the contract for the transfer of rights was originally concluded. If they have not been taken into consideration, it may be argued that the original transfer of rights did not contain rights regarding new technologies.<sup>295</sup> The traditional answer to the problem has been that if the parties have been aware of a particular technology when the rights were transferred, rights for that technology may also have been assigned. On the other hand, if the right holder has been unaware of a certain technology at the time of transfer, it may be regarded that the assignment did not cover rights for the technology in question.<sup>296</sup> Consequently, it may be asked how these rules relating to the transfer of rights apply to technological convergence and the Internet, which form a unique platform in this respect.<sup>297</sup>

291 See e.g. Jan Rosén, *Förlagsrätt, Rättsfrågor vid förlagsavtal av Jan Rosén. Akademisk avhandling för juris doktorsexamen vid Stockholms universitet 1989*. Stockholm 1989 (hereafter Rosén), p. 57 ff and p. 130 ff.

292 Other paragraphs related to transfer of rights in the Finnish Copyright Act are 28 (forbids an assignee of rights from transferring rights to a third party, unless otherwise agreed), 29 (for adjusting an unreasonable clause in a transfer agreement), 30 (limiting transferring agreements for public performing), 31–38 (regulating publishing contracts) and 39–40 (regulating agreements on filming).

293 It should be mentioned that unlike in some countries, in Finland one may also assign his/her economical rights in whole. See in more detail, Haarmann, p. 296 ff.

294 See also article 9 subsection 1 of the Berne Convention.

295 Also if new laws are drafted or a country implements a new international convention it may be argued that old contracts do not cover use as provided by the new implementations. For example, if the term of copyright is extended, let's say, with an additional 20 years from the death of the author, it may be disputed that the old contracts covered the assignment for the additional 20 years. See e.g. Haarmann, p. 306–307 and Rosén, p. 81 ff, p. 130 ff and 143 ff.

296 See e.g. *Komiteamietintö 1953:5, Ehdotus laiksi tekijänoikeudesta kirjallisiin ja taiteellisiin teoksiin* (hereafter Committee Report 1953:5), p. 64, Haarmann, p. 306 ff and Rosén, p. 84–85 and p. 157 ff and Mikko Huuskonen, *Copyright Mass Use and Exclusivity, On the Industry Initiated Limitations to Copyright Exclusivity, Especially Regarding Sound Recording and Broadcasting*. Academic dissertation, Helsinki 2006, p. 133–134. As a practical example it could be mentioned that in Holland hundreds of well-known researchers have claimed that publishers did not ask rights for digital use before year 1997 and for this reason they have posted numerous articles freely available to Internet. See e.g. [www.creamofscience.org](http://www.creamofscience.org), *Ecrim News* (online edition) *Cream of Science* by Wouter Mettrop available at, <http://www.ecrim.eu/>.

297 In technological convergence technologies integrate with each other. An example of the convergence process is that you may e.g. speak via your computer but watch television or use internet via your phone. *Sisättö*, p. 63. See also e.g. Anette Alén, *Tutkimusmatkoja monimutkaistuvaan mediaympäristöön*, published in *Oikeutta ja politiikkaa, viestintäoikeuden vuosikirja 2009* (passim). In general about the Technological convergence see also Wikipedia: [http://en.wikipedia.org/wiki/Technological\\_convergence](http://en.wikipedia.org/wiki/Technological_convergence).



Here, the main challenge is in defining a technology (or in the terms of copyright: relevant “form of use”). For example, according to the Oxford Dictionary information technology means “the study or use of systems (especially computers and telecommunications) for storing, retrieving, and sending information”<sup>298</sup> Techterms.com has specified that Information technology (IT) “refers to anything related to computing technology, such as networking, hardware, software, the Internet, or the people that work with these technologies.”<sup>299</sup> Already, the given definitions depict the vagueness of the term. Moreover, even if we attempt to define technologies used on the Internet in more detail, their scope becomes a challenge. For example, according to a study of ipoque<sup>300</sup>, in 2009 there were vast amounts of technologies (or more specifically “protocols”) for communicating content on the Internet.<sup>301</sup> Most popular protocols for communicating content on the Internet in 2009 were the following:

**Chart 1.** Ipoque’s internet study 2008/2009

*Protocol class proportions 2008/2009*

Protocol Class	Southern Africa	South America	Eastern Europe	Northern Africa	Germany	Southern Europe	Middle East	South-western Europe
P2P	65,77%	65,21%	69,95%	42,51%	52,79%	55,12%	44,77%	54,46%
Web	20,93%	18,17%	16,23%	32,65%	25,78%	25,11%	34,49%	23,29%
Streaming	5,83%	7,81%	7,34%	8,72%	7,17%	9,55%	4,64%	10,14%
VoIP	1,21%	0,84%	0,03%	1,12%	0,86%	0,67%	0,79%	1,67%
IM	0,04%	0,06%	0,00%	0,02%	0,16%	0,03%	0,50%	0,08%
Tunnel	0,16%	0,10%	–	–	–	0,09%	2,74%	–
Standard	1,31%	0,49%	–	0,89%	4,89%	0,52%	1,83%	1,23%
Gaming	–	0,04%	–	–	0,52%	0,05%	0,15%	–
Unknown	4,76%	7,29%	6,45%	14,09%	7,84%	8,86%	10,09%	9,13%

298 See Oxford Dictionaries at: <http://oxforddictionaries.com/definition/english/information%2Btechnology?q=information+technology>.

299 See Techterms.com at: <http://www.techterms.com/definition/it>.

300 Ipoque is a company providing solutions for Internet traffic management and analysis. According to ipoques own web page it is »the leading European provider of deep packet inspection (DPI) solutions for Internet traffic management and analysis.» See: <http://www.ipoque.com/company>.

301 See ipoques Internet Study 2008/2009 by Hendrik Schulze and Klaus Mochalski (hereafter ipoque 2009), p. 1–2, available <http://www.ipoque.com/userfiles/file/ipoque-Internet-Study-08-09.pdf>. Already at this point it could be compared that e.g. e-mail (belonging under Protocol Class »standard») constituted approximately 0,5% of all the internet traffic in 2009. See ipoque 2009, p. 12. For 2007 see Hendrik Schulze and Klaus Mochalski, ipoque’s, Internet study 2007, the Impact of File Sharing, Voice over IP, Joost, Instant Messaging, One-click Hosting and Media Streaming such as YouTube on the Internet (hereafter ipoque 2007), available at: [http://www.ipoque.com/userfiles/file/internet\\_study\\_2007.pdf](http://www.ipoque.com/userfiles/file/internet_study_2007.pdf).

The given Protocol Classes (on the left of the chart) encapsulate several different ways to communicate content. For example, BitTorrent, eDonkey and Gnutella belong to the Protocol Class »P2P» whereas Web pages and Web sites belong under the Protocol Class “Web”.<sup>302</sup> Additionally, Internet technologies are constantly evolving.<sup>303</sup> For example, by the time this book gets to press, the chart will most likely already be outdated. Thus, it may be asked how one should understand technological convergence in relation to the norms regarding the transfer of rights?

If the Internet is seen as a singular digital platform, the situation is not problematic, as singular permission for Internet use would suffice. However, the situation becomes more challenging if separate permissions for all the different technologies used on the Internet are required, as it is unreasonable to expect (especially laymen) authors and prosumers to have detailed knowledge regarding all the existing technologies in order to take them into consideration in their transactions.

This may also be seen when we evaluate licenses granted by professionals. For example, collective management organisations seem to be unaware of or uninterested in examining which technologies are used in detail. For example, Teosto (a Composers’ copyright society in Finland) has offered a license for “downloading” although it is questionable if »downloading» as such is a technology since multitude of technologies may be used for downloading.<sup>304</sup> Tuotos (a Copyright association for audio-visual producers in Finland), on the other hand offers licenses to present and communicate domestic movies “in premises of educational institutions”. This indicates that, references to specific technologies are not included in the licenses of collective management organizations. To the extent that references are being made to technologies, they are general (such as references to “podcasting” or “streaming”).<sup>305</sup> Furthermore, collective management organisations (at least in Finland) seem to lack uniform terminology regarding different technologies.<sup>306</sup> Use

302 The following examples may be given for the rest of the Protocol Classes: 1. Streaming refers to audio and video streaming, such as Flash, QuickTime and Real Media. 2. VoIP refers to Voice over IP (internet telephony) such as Skype, IAX and SIP. 3. Instant Messaging (IM) refers to IRC, Google Talk and Yahoo. 4. Tunnel refers to encrypted and unencrypted tunnelling protocols such as OpenVPN, SLL and Tor. 5. Standard refers to Legacy Internet Protocols such as Telnet, Usenet, SMTP and e-mail. 6. Gaming refers to most popular multiplayer and network games and 7. Unknown refers to non-classified traffic. See ipoque 2009, p. 1.

303 For example, even a simple classification between “software” and “hardware” became questionable after cloud computing emerged as it enabled providing both services over a network.

304 See Teosto’s homepage, available at (in English): <http://www.teosto.fi/teosto/websivut.nsf/3071421733727897c2256e0400462a07d4ee60d1d5da4fe4c22577110043984c!OpenDocument>. Furthermore, from a user’s perspective the license for downloading Teosto offers seems actually to be a license for uploading, instead of downloading. Regarding differences between uploading and downloading see e.g. Wikipedia: [http://en.wikipedia.org/wiki/Uploading\\_and\\_downloading](http://en.wikipedia.org/wiki/Uploading_and_downloading). Referred pages visited in February 2012.

305 For example, it may be asked whether e.g. Podcasting is a technology or whether RSS-feeds a podcaster may use should be instead be understood as technologies. In other words giving exact definitions for technologies may prove to be a difficult task.

306 For example, regarding podcasting Teosto refers to programs similar to radio, containing speech and music (emphasis here) but Gramex (a Finnish collective management organisation performing artists and phonogram producers) refers use similar both to television and radio. Regarding »podcasting» see e.g. homepages of Teosto (in Finnish: <http://www.teosto.fi/fi/podcasting.html>) Gramex (in Finnish): [http://www.gramex.fi/fi/musiikin\\_kayttajat/sahkoinen\\_media\\_ja\\_av-tuotanto/aanitteet\\_internetissa/podcasting](http://www.gramex.fi/fi/musiikin_kayttajat/sahkoinen_media_ja_av-tuotanto/aanitteet_internetissa/podcasting) and in general Wikipedia: <http://en.wikipedia.org/wiki/Podcast>.

of more general terminology may be regarded as understandable, as it would no doubt be burdensome, if not impossible, to constantly update the list of applicable technologies from their individual members.<sup>307</sup> However, this indicates that it is difficult to require separate licenses for separate technologies for communicating content on the Internet.

Consequently, the above findings suggest that the Internet should be perceived as one platform for communicating content instead of evaluating in detail every technology used. Alternative interpretation necessitating separate permissions for constantly renewing technologies would easily endanger possibilities to conclude individual transactions and hence the objective set in article 27 of the Universal Declaration of Human Rights. In this respect, a new presumptive provision to rules regulating the transfer of rights could provide a solution.<sup>308</sup> For example, one could suggest a provision postulating that when rights are assigned for use of content on the Internet, a right holder accepts that the transfer covers all forms of use on the Internet.

## **6.5. ABOUT PRACTICAL POSSIBILITIES TO CONCLUDE INDIVIDUAL TRANSACTIONS IN GENERAL**

Finally, the extent to which it is rational to expect that individual authors and prosumers conclude transactions with each other shall be generally evaluated. In this respect, it should first be mentioned that it is difficult to find studies or well established licensing practices between individual authors and prosumers as natural persons for use of content on the Internet. This is understandable for the following reasons: firstly, even if we disregard the problem that even singular words or few word phrases may exceed the required threshold for copyright protection and that in theory authors and prosumers should be aware of all those copies that are haphazardly being produced on different platforms during communication processes but do not fit under the exemption provided in Article 5(1) of the Infosoc directive, a clear hindrance to conducting individual transactions is the impossibility of finding all the legal right holders of the ever expanding publicly available mass of information. For example, there is no universal register tracking information on the owners of all expressions found on the internet. The difficulty of finding appropriate individuals can also be read from the studies conducted by the Ministry of Education and Kopioisto (a copyright organization for authors, publishers and

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<sup>307</sup> Another thing is that from a potential user's perspective it becomes problematic if collective management organisations were able dictate what type of use is allowed. Such a power could prevent users from using their technologies and consequently prevent their companies to conduct business at all.

<sup>308</sup> This could be possible as the European Union has not harmonized rules regarding transfer of rights. See also *Pihlajarinne*, p. 238–239

performing artists in Finland), which have attempted to evaluate content used in educational institutions in order to distribute compensations thorough collective management organizations to the proper right holders. In short, the studies are based on a cross sectional sampling of data used and consequently provide only very general information about content used in educational institutions.<sup>309</sup> Sometimes, the appropriate right holders have died or are simply impossible to locate, even if they were once known.<sup>310</sup>

Moreover, even if the parties were able to contact each other they should speak the same language as concluding contracts may be challenging when the parties lack a common language (although it could be possible). They should also be able to draft proper agreements taking in to consideration all the used rights and technologies as the literal reading of the law postulates.<sup>311</sup> Often, permissions are needed from several individuals, which multiplies the difficulties.<sup>312</sup> For example, when it comes to music, a prosumer would need a license from each composer, lyricist, arranger, producer, performing artist and phonogram producer.<sup>313</sup> Or the other way around, all individual members of a band should individually and constantly grant licenses

309 See e.g. a study conducted by the Ministry of Education and Kopiosto called Digitaalitekniikka opetuskäytössä, Digitaalisen aineiston kopiointi sekä www-sivujen käyttö. Opetusministeriön ja Kopiosto ry:n tiedotus- ja selvitysprojekti (hereafter Digistudy), 2004. Gathered information in the study was about the used www-pages, their www-addresses, names and popularity in educational use. No attempt was even made to collect exact information regarding used content. The same applies to studies regarding use of content by printing and scanning of content in educational institutions. See Jan-Otto Malmberg, Tulostaminen, skannaaminen ja esitysgrafiikan käyttö peruskouluissa ja lukioissa 19.1.2009 ja Jan-Otto Malmberg, Ammatilliset oppilaitokset – tulostaminen, skaus, esitysgrafiikka 14.4.2008. See e.g. study Digitaalinen kopiointi peruskoulussa ja lukiossa 9.4.2003 (digital copying in primary schools and secondary high), Jan-Otto Malmberg, Logit Oy and Jan-Otto Malmberg, Digitaalinen kopiointi korkeakouluissa 17.8.2004 (digital copying in universities) and Jan-Otto Malmberg, Digitaalinen kopiointi ammatillisissa oppilaitoksissa ja ammattikorkeakouluissa 7.10.2003 (polytechnics), Logit Oy. The same generality can be seen from the photocopying studies conducted by Kopiosto and the Ministry of Education. See e.g. Jan-Otto Malmberg, Peruskoulujen ja lukioiden valokopiointitutkimus 30.9.2008 (primary schools and secondary high) and Jan-Otto Malmberg, Peruskoulujen ja lukioiden valokopiointitutkimus (primary schools and secondary high) 27.2.2001 and Jan-Otto Malmberg, Valokopiointitutkimus 15.2.2006 (adult educational centres).

310 For example, considering mere family-photo albums it may be asked if it is possible pinpoint all the relevant right holders of the taken pictures. In fact, amounts of orphan works may be counted in hundreds of millions. See e.g. Commission Staff Working Paper, Impact Assessment on the Cross-border Online Access to Orphan Works, Accompanying the document, Proposal for a Directive of the European Parliament and of the Council, on certain permitted uses of orphan works, COM (2011) 289 final, p. 9 and 11 ff.

311 It should also be noted that interpretations of law also vary depending on the situation and country making it easily difficult for individual authors and computer users to know whether a certain limitation applies or not. As it is difficult, even impossible, to give an exhaustive list of interpretations to all situations, it is clear that ambiguity related to possibilities to grant and obtain licenses is always present.

312 Gervais talks of the same challenge as fragmentation and describes it in the following way: “The fragmentation of copyright, therefore, occurs on many different levels – rights contained in national laws, which recognize several economic rights (reproduction, communication to the public, adaptation, rental etc.); within market structures; within licensing practices; within a repertory of works; within different markets (language, territory); and through the interoperability (or lack thereof) of rights clearance systems. Fragmentation has an impact directly on all affected parties, whether they be right holders, users of copyright works or regulatory authorities that oversee the process.” Licenses may even be needed even from different countries as Internet is in practice transnational making it difficult enclose it in “virtual national walls.” Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, published in *Collective Management of Copyright and Related Rights*, second edition, (eds.) Daniel Gervais, Kluwer Law International BV 2010 (hereafter Gervais 2010), p. 11.

313 It should be mentioned that legal persons such as e.g. collective management organizations may occasionally offer licenses to prosumers, but they are irrelevant from the viewpoint of this article as the article evaluates possibilities to conclude transactions between individual authors and prosumers as droit d’auteur copyright theory and strating point of fundamental rights protection postulates.

to perhaps millions of their fans wishing to share their content on the Internet. In cases of audiovisual products, the amount of right holders is often even greater.<sup>314</sup> Due to the transnational nature of Internet, permissions are actually needed also to copy and communicate content from servers situated in other countries.<sup>315</sup>

This is not to imply that individual authors and prosumers as natural persons never conclude individual transactions with each other. For example, a court case addressing a failure to ask permission to post a photograph to Facebook may be found from Finland. In a case of the District Court of Helsinki, A argued that B had failed to ask permission from A to post a photograph taken by A to B's Facebook profile. The case was introduced as a criminal case (docket number R10/1641), but was in the end settled as a civil case (L10/21045). The actual motive for the case might have been a break-up of the parties' relationship.<sup>316</sup> Nevertheless, at least for the present, it is difficult to find other such disputes between individual authors and prosumers.<sup>317</sup>

Taking the above-mentioned into consideration, it is not rational to expect that we would constantly conclude individual transactions with each other as individual authors and prosumers as it pertains to use of content on the Internet. Thus, it shall be concluded that even if individual authors and prosumers would occasionally grant and obtain licenses based on exclusive rights for use of content on the Internet, those licenses are bound to be rare and economically insignificant.

## 6.6. CONCLUDING REMARKS – AUTHORS RIGHTS AS A FACADE?

The above findings question functionality of copyright theory granting exclusive rights to individual authors as initial right holders for use of content in open networks where everyone are easily users. It is in theory problematic to subject the right to science and culture as provided in the Article 27(1) of the UDHR and 15(1)(a) of the ICESCR a property right and it is challenging for anyone to rigorously evaluate whether a certain usage situation endangers or in fact benefits economic rights

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314 As it pertains to audiovisual works, Gervais has explained the challenge in the following way: "A film might include rights to a screenplay, a book on which the screenplay was based, musical works incorporated in the film, any art or photographs used in the setting, as well as the end product the film itself. Each of the works in turn involve several different rights fragments and, consequently, multiple right holders and systems of rights clearance and possibly also guilds or unions." See *Gervais* 2010, p. 13.

315 For example, according to Gervais a person posting only music to Internet would need at least the following rights: 1. Reproduction on the emission server, 2. Authorization of communication to the public in territory of emission, 3. Communication to the public in territory of reception, 4. Reproduction in the territory of reception. Points 1 and 4 may be private copies, which in theory should be examined case by case. See *Gervais* 2010, p. 11.

316 Information regarding the case was obtained from a district court judge Kari Lappi.

317 For example, no similar case were found from databases of Finlex and Edilex. Finlex is a database maintained by the Ministry of Justice and Edilex a wider database maintained by Edita Publishing.

of authors or whether a certain use endangers the author's fundamental rights ("essential foodstuff, of essential primary health care, of basic shelter and housing ...") at all. Moreover, it is somewhat paradoxical to necessitate that permission to use is needed, if a certain piece of content has been placed openly available for everyone. Increased amounts of freer licenses may be seen as the result of this paradox as they largely waive exclusive rights. It is also difficult to see that individual authors and prosumers would have necessary means to take technological convergence into consideration when drafting appropriate licenses. Finally, to the extent concluding individual transactions is possible (excluding freer licenses), only petty amounts of evidence (if any) indicate that individual authors and prosumers are interested in doing so. It simply is difficult to see that e.g. Phil Collins and all the members of Genesis would or could constantly conclude individual transactions with tens of thousands of individual prosumers interested sharing their music on the Internet.

Due to these notions it also becomes questionable whether copyright is even intended to directly benefit individual authors and prosumers as postulated by the Article 27 of the UDHR and 15 of the ICESCR. Consequently claims that copyright exists in the first instance in order to benefit certain businesses become plausible. For example, *Gervais* has stated that copyright is primarily for "professionals"<sup>318</sup> to "organize markets for certain types of works of art or the intellect."<sup>319</sup> *Lessig* has more straightforwardly stated that copyright is "protectionism to protect certain forms of business".<sup>320</sup> *Huuskonen* on the other hand has described the situation in the following way: "Author's right, therefore, seems to be a product of the publishers' innovative defense in a situation where the risk of losing the present monopoly position seemed evident. Still, as a purely tactical instrument, it probably would not have succeeded throughout the centuries without other justifiable reasons that were emerging in society from an ideological basis (Locke). The Stationers' Company was – looking back almost 300 years – able to use an idea that had already been discussed in philosophical circles, and which enjoyed the benevolence of the law-makers. In this way, the change resembled modern decision-making: how can a politician oppose the idea of the protection of an ailing artist? The author's right justification, which was later developed into a strong human rights tendency, also created a path-dependency in copyright legislation."<sup>321</sup>

This would mean copyright is primarily used to "organize markets" (and power) from individuals' (by contracts) to private companies instead of protecting individual

318 See *Gervais* 2010, p. 10 and 14 and *Gervais* 2006, p. 8.

319 *Gervais* 2010, p. 15. In the citation *Gervais* refers especially to economical rights of a right holder.

320 Lawrence *Lessig*, *Free Culture, How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, The Penguin Press, New York 2004, p.9. An exhaustive list for limitations in the Infosoc directive allowing only those commercial uses that existed before the 21<sup>st</sup> century also indicates the protectionism element: it does not seem possible for new commercial forms of use benefitting from copyright limitations regarding use of content on the Internet to emerge. This would be consistent with the argument of protectionism for business.

321 Mikko *Huuskonen*, *Copyright Mass Use and Exclusivity, On the Industry Initiated Limitations to Copyright Exclusivity, Especially Regarding Sound Recording and Broadcasting*. Academic dissertation, Helsinki 2006, p 118.

authors in the first instance. In other words the legal right (or business model) *de jure* granted initially for individuals would *de facto* seem to exist for protecting legal persons basing their business model on the idea of a closed system: content may only be used provided permission against compensation is first granted.<sup>322</sup>

However, individualistic copyright theory appears as a facade, if power is primarily used for other purposes but primarily for protecting individual authors whose essential economic interests are being endangered.<sup>323</sup> In other words, after the assignement of rights adiminisering rights takes place according to the the terms and objectives of the legal person. Consequently it becomes relevant to ask how fundamental rights analysis relates to position of legal persons. Especially, if power is *de facto* used to protect private corporate interests even with a possibility of criminal sanctions, it may be asked how such a use of power should be understood in relation to fundamental rights of others, if fundamental rights are taken seriously? Therefore, this book next evaluates the right to science and culture as provided by Article 27(1) of the UDHR and Article 15(1)(a) of the ICESCR and its relationship to corporate power. As copyright liability means also threat of criminal sanctions and use leading to liability may take place at home, references shall also be to the right to “to life, liberty and security of person” as protected by Article 3 of the UDHR or to “the right to privacy” as protected by Article 12 of the UDHR.

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322 It is possible that occasionally rights are assigned to legal persons whose business model is not closed. Open access journals may be given as an example.

323 It could also be mentioned that one (although rather wide) definition for corruption is fulfilled if a societal system is being used to achieve other objectives what it formally ought to achieve. About definitions for corruption see e.g. Petri Koikkalainen – Esko Rieppula, Näin valta ostetaan, lyhyt oppimäärä poliittisesta korruptionsta suomessa 2006 – 2009, p. 111.



## 7 THE RIGHT TO SCIENCE AND CULTURE AND CORPORATIONS AS RIGHT HOLDERS

### 7.1. REGARDING LEGAL PERSONS AND FUNDAMENTAL RIGHT PROTECTION IN GENERAL

Natural persons have traditionally been considered to be the subjects of human rights protection, whereas legal persons have often been explicitly excluded from human rights protection. As has been explained, this is a common starting point of fundamental rights.<sup>324</sup> Intellectual property has not been considered to be human right, but has instead been connected to property rights. This has been stated in General Comment No. 17, chapter 7, in the following way: “Under the existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights. However, as noted above, their entitlements, because of their different nature, are not protected at the level of human rights.”<sup>325</sup> Despite this, the European Court of Human Rights has found that human rights protection may extend also to legal persons.<sup>326</sup> Although these decisions do not specifically refer to legal persons owning copyright protected content. Moreover, Article 1(1) of Protocol 1 referring to property (hereafter P1-1) of the European Convention on Human Rights specifically states that

“Every natural *or legal person* is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties” (emphasis added).

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324 See e.g. chapter 2.2. and General Comment 17, paragraph 2 (emphasis added). See also *Shaver*, p. 133.

325 See also *Helfer*, p. 84 and *Mylly*, p. 202.

326 See e.g. *The Sunday Times v United Kingdom* (Series A No 30), European Court of Human Rights (1979-80) 2 EHRR 245 and for more examples, *Harding*, *Kohl* and *Salmon*, p. 25 ff. See also *Mylly*, p. 187 and *Ojanen*, p. 120.



Although subsection 2 of the P1-1 allows states to limit property rights, subsection 1 of the P1-1 suggests that the property of both natural and legal persons is protected by the ECHR.<sup>327</sup> Furthermore, the preliminary material of the Constitution of Finland accepts that legal persons may in certain occasions obtain indirect (or derivative) fundamental rights protection.<sup>328</sup> In Finland, this means that property right protection may extend to legal persons in cases where a certain proposition would affect legal persons in a way such that the assets of the natural persons behind the legal person would be affected.<sup>329</sup> The more distant the relationship between a natural person and a legal person is, and the less concretely the measures affect the economic interests of the individuals behind the legal person, the more unlikely the legal person obtains fundamental/constitutional right protection.<sup>330</sup> It has been said that this type of case could be at hand, for example, if a proposed act would affect smaller companies such as family businesses holding focal wealth of the individuals running the companies. Thus the intention of indirect protection is not to protect large corporations.<sup>331</sup>

The possibility of extending fundamental, and especially human, right protection to legal persons raises an interesting question since human rights should initially protect only individuals as natural persons, as explained above. If fundamental rights in general do not accept legal persons as subjects of their protection, when it is justified to grant legal persons human rights protection as P1-1 nevertheless postulates? For example, individualistic *droit d'auteur* copyright theory specifically emphasises the role of authors as natural persons at the core of copyright. Consequently it is not surprising that in Finland the legislator has explicitly stated,

327 See also *Mylly*, p. 206 – 207 and *Pellonpää I*, p. 600 – 601. It should also be noted that fundamental rights of the European Community are not, unlike other fundamental rights, universal. They apply to certain “special” or “sectoral” rights, as rights claiming to be valid only for certain classes of natural or legal persons. One of the principal limitations of the applicability of Community fundamental rights is made by the distinction between nationals of the Member States and third country nationals.” *Ojanen*, p. 119 (emphasis original). There are also exceptions to the rule as e.g. article 141 (formerly article 119) of the EC Treaty secures equal pay to men and women regardless of their nationality.

328 See Perusoikeuskomitean mietintö 1992:3 (Committee Report 1992:3), p. 49, 60 and 220, Government Bill 309/1993, p. 23 – 24, *Hiden*, p. 10 ff and *Länsineva*, p. 106 ff.

329 See chapter 7.2, the third possibility.

330 See especially Committee Report 1992:3, p. 49, 60 and 220 and Government Bill 309/199 p. 23 – 24 and Committee Report 45/1996. From legal literature see e.g. *Hiden*, p. 16, Pekka Hallberg, Perusoikeusjärjestelmä, published in Hallberg (eds.) Perusoikeudet, Helsinki 2011, p. 41 and Erkki Pysyinen, Omaisuudensuoja Suomessa, Kokemuksia ja näkemyksiä eduskunnan perustuslakivaliokunnan puheenjohtajana, Jyväskylä 1984m p. 49 – 50. Even if the doctrine for indirect protection were disputed and direct constitutional protection for property of legal persons is accepted, one should in the end weigh the position of the parties in the case and protect the weaker party. For example, according to *Länsineva* protection granted to legal persons would not be as effective as it is for individuals. According to him in a situation when an individual's rights were in a conflict with a legal person's rights, one should weigh how close the relationship of the individual behind the legal person is to the constitutional right in question. If the connection is distant, an individual against the legal person should win the case. In order to weigh in favour of the legal person, one should find additional justifications to support the company's case. If interests of two legal persons should be weighed, one should weigh the connection of individuals behind the legal persons to the protected right. For example, constitutional interests of an internationally listed company would be weaker in comparison to small family business. *Länsineva*, p. 108 ff and 116. See also Constitutional Law Committee's Reports 45/1996 vp, 17/1997 vp.

331 See Committee Report 1992:3, p. 60, p. Government Bill 309/1993, p. 23 and especially *Hiden*, p. 15 - 16. It should be noted that only private legal persons may be indirectly protected. Government, municipalities/cities, consolidations of municipalities, congregations, churches and public companies cannot invoke constitutional protection.

following the individualistic *droit d'auteur* copyright theory, that constitutional protection for copyright “*should be limited only to natural persons*”.<sup>332</sup> Therefore, the position of legal persons from the viewpoint of human rights protection shall be evaluated next. As subjects of fundamental right protection in the first instance are natural persons, the evaluation shall be critical. It shall not be argued that legal persons cannot have rights *per se*, but the focus is on the “human” rights aspect of legal persons, especially larger corporations.<sup>333</sup> The reciprocal relationship of the right to science and culture and property owned by legal persons shall then be specifically evaluated in the light of individualistic *droit d'auteur* copyright theory.

## 7.2. LEGAL PERSONS AND HUMAN RIGHTS IN THEORY

The general reason for excluding legal persons from human rights protection is that they are legal constructs and, in this respect, artificial entities.<sup>334</sup> However, Christopher *Harding*, Uta *Kohl* and Naomi *Salmon* have evaluated in more detail whether one could find justifications for “human” rights protection for legal persons. Consequently, the structure and analysis of this chapter strongly follows the analysis of *Harding*, *Kohl* and *Salmon* combined with thoughts of Joel *Bakan*.<sup>335</sup> They focus on human rights protection of larger corporations, which is consistent with the idea adopted by the Finnish constitution, that smaller legal persons may be protected indirectly through natural persons working in them, a topic which shall also be addressed in this chapter.

*Harding*, *Kohl* and *Salmon* evaluate whether legal persons should have human rights because they a) are persons with legal capacity, b) were historically created to protect humans c) are seen as derivate right-holders in order to benefit their natural protagonists (indirect protection) or d) should be regarded as human right holders themselves because they have the same values and attributes as humans do. If option-d is argued, legal persons should act as autonomous moral agents or have their own interests and needs.<sup>336</sup>

332 Committee report 1992:4, p. 108 – 109.

333 It is also possible that articles of a certain company define that the legal person conducts charity work as its main task. If this the case the presented analysis does not apply.

334 See Stephen *Bottomley*, Corporations and Human Rights, at “Commercial Law and Human Rights”, Ashgate Dartmouth Publishing 2002, p. 62. See also *Harding, Kohl & Salmon*, p. 25 – 26. According to *Harding, Kohl and Salmon* “the creation of a legal person is designed to enable a group of individuals to become collectively a player in the legal world, to make it a subject of legal rights and legal duties, as opposed to moral rights and duties.” *Harding, Kohl & Salmon*, p. 29 – 30. See also, Matti *Muukkonen*, Yhdistymisvapaus ja yhdistysoikeuden järjestelmä, a publication of the University of Eastern Finland, Dissertations in Social Sciences and Business Studies, 2012, p. 101. Regarding challenges defining a mere concept of person see e.g. Ohlin, Jens David, Is the Concept of the Person Necessary for Human Rights? (January 30, 2005). Columbia Law Review, Vol. 105, p. 209, 2005 (passim). Available at SSRN: <http://ssrn.com/abstract=1245942>.

335 Regarding *Bakan*’s analysis see Joel *Bakan*, The Corporation, the Pathological Pursuit for Profit and Power, New York 2004 (passim).

336 See *Harding, Kohl & Salmon*, p. 23 – 51.

Firstly, Harding, Kohl and Salmon consider it difficult to see that legal capacity could qualify as reasoning for human rights protection, as legal capacity already itself is recognized as human right in Article 6 of the UDHR. Thus if legal capacity would be “human right granted, it means that even those who do not in fact enjoy it, still come under the human rights umbrella. [Also] ... a significant minority of individuals have under national systems only limited or no legal capacity at all, but – far from depriving them of human rights protection – this has made them the particular focus of the human rights movement. In the past and to a lesser extent today, these would have been slaves, women and other discriminated-against minorities.”<sup>337</sup> Thus it is difficult to see that legal capacity could be a prerequisite for the granting of human rights but rather its consequence.

Secondly, legal persons were not historically designed to protect humans, as history itself does not support arguments to this direction. For example, the UDHR itself was specifically designed after the Second World War to protect individuals as humans. To the extent similar documents for “inalienable rights” have been drafted, such as e.g. the French Declaration of the Rights of Man Citizens (1789) or the US Declaration of Independence (1776), they have not protected everyone. For example, slavery, racial discrimination and limited suffrage have lasted long after the referred conventions were enacted. Consequently it is difficult to derive human rights protection to legal persons from history.<sup>338</sup>

Thirdly, an argument postulating companies as derivative rights holders also faces challenges to outcome. An argument making legal persons derivative right holders suggests that human rights protect companies in order to benefit natural persons owning and working in them, i.e. companies would have extrinsic benefits for the individual persons involved. A practical problem related to this argument is that individuals within legal persons are rarely equal in position, creating a risk that granted human rights enhance the interests of the most powerful in the company.<sup>339</sup> This would be controversial considering that human and fundamental rights should protect certain “essential interests” such as foodstuffs, housing etc. In practice, companies are not treated as derivative right holders, but rather as

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337 *Harding, Kohl & Salmon*, p. 30.

338 *Harding, Kohl & Salmon*, p. 32 – 35. See also *Bakan*, p. 16. However, it should be noted this has not prevented legal persons e.g. from invoking a right to free trial for their protection although the right was originally drafted to protect freed slaves.

339 Regarding problems related to extending indirect/derivative effect of fundamental rights to legal persons a problem also is that occasionally there simply are not corresponding rights for natural persons and companies. For example, in *Société Colas Est v. France* (no: 37971/97, 16-04-2002) it was regarded that companies privacy, as provided in Article 8 of the ECHR, had been violated by searching the offices of companies (by investigators from the Directorate General for Competition, Consumer Affairs and Repression of Fraud). However, it is difficult to perceive how such an act could violate *privacy* of the companies or even privacy of their shareholders. As *Harding, Kohl & Salmon* (p. 36) state: “[Investments of shareholders] may have suffered as a result of the search and subsequent conviction, and thus their property rights may indirectly have been interfered with, but not their right to privacy.” In other words it may be asked if a legal person may have a “privacy” that may be violated. Another thing is if a certain action to premises of a legal person violate its economical interests i.e. property rights. See also *Harding, Kohl & Salmon*, 36 – 37 and 103 ff.

direct right holders, making an argument that legal persons have derivative human rights problematic.<sup>340</sup>

Consequently, it may fourthly be asked whether legal persons should be human right holders themselves on the basis that they have the same values and attributes as humans do. In other words, if companies (or animals, trees etc) have the same attributes as humans, they should also obtain human rights protection. In order to evaluate whether this is the case, it should first be defined why humans have rights in the first place.<sup>341</sup> In this respect, an answer could be that a) humans are thinking agents (choice of rights theory) or have b) special interests (interest theory of rights) that should be protected.

The challenge is that even if humans should have rights according to the mentioned standards, it is difficult to expand them accordingly to companies. This is because companies may be regarded as either ‘artificial constructs’ or as ‘real entities’. If companies are perceived to be ‘artificial constructs’, there is no person capable of having attributes similar to those which humans have.<sup>342</sup> On the other hand if legal persons are perceived as ‘real entities’, which have separated themselves from the state and from any particular individual, other challenges arise for considering them to have human values and attributes. For example, when evaluating companies as human right holders, one could attempt to argue that the basis of rights is an agent capable of an autonomous will and ability to take into consideration other persons and make moral considerations (choice of rights theory).<sup>343</sup> However, this raises the problem that company actions and rationality do not necessarily follow the morality and rationality of those individuals who are behind the company and who are irrelevant and replaceable in the end. Especially in bigger companies, individual morality and rationality often transforms in a group setting of a company in a way that may lead individuals to act in ways they would not otherwise do. This is enabled by the task of companies to function as efficient economic entities who are often legally obligated only to maximise profit.<sup>344</sup> This is rational from an economic viewpoint and does not necessarily lead to immoral results, however, this may be (and often is) the case.

340 *Harding, Kohl & Salmon*, p. 36 – 37.

341 Bentham pondered and answered the question in the following way: “Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?” Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Chapter XVII, note 122 (emphasis original). Available at: <http://www.econlib.org/library/Bentham/bnthPML18.html#a122>. See also *Harding, Kohl & Salmon*, p. 36.

342 *Harding, Kohl & Salmon*, p. 38-39.

343 See Jerome J. Shestack, *The Philosophic Foundations of Human Rights*. *Human Rights Quarterly* 20 (1998), p. 216 referring to modern human rights theories (and e.g. to Kant): “The basis [for moral law] is the individual as a transcendental subject capable of an autonomous will.” See also *Harding, Kohl & Salmon*, p. 37.

344 *Harding, Kohl & Salmon*, p. 42, who also state: “Moral concern [companies] is permitted to the extent to which it increases profits – a contradiction in terms. See also *Bakan* (passim). Regarding Finnish legislation see e.g. Section 5 of the Limited Liability Companies Act – Finland (624/2006) stating: “The purpose of a company is to generate profits for the shareholders, unless otherwise provided in the Articles of Association.”

*Bakan* has widely addressed the problem related to the amorality of corporations in their legally defined mandate to maximise profits. The following quotations depict the problem. Firstly, activities of corporations partially correspond to a diagnosis of a psychopath as “... the corporation is singularly self-interested and unable to feel genuine concern for others in any context. Not surprisingly, then, when we asked Dr. Hare to apply his diagnostic checklist of psychopathic traits (italicized below) to the corporation’s institutional character, he found there was a close match. The corporation is *irresponsible*, Dr. Hare said, because ‘in an attempt to satisfy the corporate goal, everybody else is put at risk.’ Corporations try to ‘*manipulate* everything, including public opinion’, and they are *grandiose*, always insisting ‘that we’re number one, we’re the best’. A *lack of empathy* and *asocial tendencies* are also key characteristics of the corporation, says Hare – ‘their behaviour indicates they don’t really concern themselves with their victims’; and corporations often *refuse to accept responsibility for their own actions* and are *unable to feel remorse*: ‘if [corporations] get caught [braking the law], they pay big fines and they ... continue doing what they did before anyway’. ... Finally, according to Dr. Hare, corporations relate to others *superficially*—‘their whole goal is to present themselves to the public in a way that is appealing to the public [but] in fact may not be representative of what th[e] organisation is really like.’ Human psychopaths are notorious for their ability to use charm as a mask to hide their dangerously self-obsessed personalities. For corporations, social responsibility may play the same role. Thorough it they can present themselves as compassionate and concerned about others, when, in fact, they lack the ability to care about anyone or anything but themselves.”<sup>345</sup>

The following examples of Bakan may be used as illustrations of corporate amorality: “IBM – a company where ‘if your customer needs help, you jump,’ according to Irving Wladawsky-Berger, vice president, technology and strategy – jumped when Hitler sought its technical assistance in running the Nazi extermination and slave-labour programs. IBM provided the Nazis with Hollerith tabulation machines, early ancestors of computers that used punch cards to do their calculations. Edwin Black, author of *IBM and the Holocaust*, says, ‘The head office in New York had a complete understanding of everything that was going on in the Third Reich with its machines...

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<sup>345</sup> See *Bakan*, p. 56–57 (emphasis original), where he refers to his interview with Dr. Robert Hare.

that their machines were in concentration camps generally, and they knew that Jews were being exterminated.’ ... IBM’s motivation for working with the Nazis, says Black, ‘was never about Nazism...it was always about profit, which is consistent with the corporation’s amoral nature. Corporations have no capacity to value political systems, fascist or democratic, for reasons of principle or ideology. The only legitimate question for a corporation is whether a political system serves or impedes its self-interested purposes.’ According to Peter Drucker – who says he ‘discussed it more than once with old Mr. Watson,’ the head of IBM at the time – Thomas Watson had reservations about working with the Nazis. ‘Not because he thought it was immoral’, says Drucker, but ‘because Watson, with a very keen sense of public relations, thought it was risky’ from a business perspective. In a similar spirit, Alfred Sloan, Jr., chairman of General Motors in 1939, seemed morally unconcerned about his company’s work for the Nazis. The German subsidiaries were ‘highly profitable,’ he noted in defence of GM’s investments in Germany, and Germany’s internal political affairs ‘should not be considered the business of the management of General Motors.’ Though the assistance provided to Nazis by U.S. corporations may seem shocking in retrospect, it should not be forgotten that many U.S. corporations today regularly do business with totalitarian and authoritarian regimes – again, because it is profitable to do so.”<sup>346</sup>

It should be noted that according to Ben *Urwand* content industry does not fare any better in this respect. He has examined relationship between Hollywoods film studios and Nazi regime during 1930 and writes: “Over the course of the investigation, one word kept reappearing in both the German and American records: “collaboration” (*Zusammenarbeit*). And gradually it became clear that this word accurately described the particular arrangement between the Hollywood studios and the German government in the 1930s. Like other American companies such as IBM and General Motors, the Hollywood studios put profit above principle in their decision making to do business with the Nazis. They funnelled money into the German economy in a variety of disturbing ways. But, as the United States Department of Commerce

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346 See *Bakan*, p. 88 and endnote 7 on p. 89 for ample of evidence that IBMs actions are no exception. See also *Harding, Kohl & Salmon*, p. 42–43 for similar examples. A recent contemporary example is a case where Nokia Siemens was accused by Iranian Nobel Peace Prize laureate Shirin Ebadi for providing technology that according to Shirin Ebadi helped Tehran repress political opponents. See e.g. Gwladys *Fouche*, Iran Nobel winner seeks Nokia Siemens sanctions, Reuters, February 15, 2010, available at (in English): <http://www.reuters.com/article/2010/02/15/us-iran-nokiasiemensnetworks-interview-idUSTRE61E3SZ20100215>. See also Steve *Stecklow*, Nokia Siemens Venture to Reduce Its Business in Iran, The Wall Street Journal, December 14, 2011, available at: <http://online.wsj.com/article/SB10001424052970203430404577096503401073904.html>.

recognized, the Hollywood studios were not simply distributors of goods; they were purveyors of ideas and culture. They had the chance to show the world what was really happening in Germany. Here was where the term “collaboration” took on its full meaning. The studio heads, who were mostly immigrant Jews, went to dramatic lengths to hold on to their investment in Germany.”<sup>347</sup>

This does not mean that humans are necessarily any better. In words of *Harding, Kohl & Salmon*: “self-interest and the desire for personal profit are the very human motives which capitalism is based. The problem is that the company is a monorail: it enshrines and institutionally legitimises self interest and profit. ... There is no moral understanding or reasoning; beauty, art or suffering are incomprehensible to the corporate amoral mind. ... As such, the company is a far cry from the autonomous self-willing moral agent who provides the core and *raison d’être* of human rights under the liberal tradition.”<sup>348</sup> It therefore follows that the main task of corporations is to maximize profits to owners and, in doing so, other values and objectives – even if they are protected as fundamental rights – are secondary to them. Maximizing profits to owners is not an objective protected as a fundamental right. Instead, it is an aim that has been set in regular laws.

Finally, we may also evaluate corporations from the viewpoint of the interest theory of rights. It postulates that rights are interests or needs that the law should protect thorough imposing restrictions to others. Under this theory, rights do not protect liberty of individuals but are instead there to protect a moral good defined by a philosopher. However, the interest theory also has obstacles to outcome. For example, it cannot properly justify why rights are needed at all, given that interests may be protected thorough duties and obligations. It also necessitates that we should distinguish and protect the worthiest interests. In a human rights context, it would be ‘human nature’ and consequently we should define basic human needs. For example, it could be argued that our embodiment is the source of our vulnerability, and consequently an interest that should be protected. However, even if such an argument is accepted, it is clear that companies do not fulfil the corresponding preconditions as “corporate needs and interests bear no resemblance to basic human needs and interests such as life, absence of pain, food, shelter, and so on, which provide the common foundations of human rights.”<sup>349</sup> Therefore, in the light of jurisprudence it is difficult extend human rights protection to legal persons.<sup>350</sup>

It could also be mentioned that it is challenging to find justifications for extending human rights protection to legal persons from a

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<sup>347</sup> See Ben *Urwand*, *The Collaboration, Hollywood’s Pact with Hitler*, The Belknap Press of Harvard University Press. Cambridge, Massachussettes & London, England 2013 , p. 8 – 9 and *passim*.

<sup>348</sup> *Harding, Kohl & Salmon*, p. 43.

<sup>349</sup> *Harding, Kohl & Salmon*, p. 45.

<sup>350</sup> It should be noted that the analysis needs not to apply to smaller legal persons.



practical viewpoint. One may attempt to argue that corporate human rights benefit societies by promoting a healthy market economy and democracy (e.g. through freedom of speech of the press). However, although legal persons and market economy contains many activities people benefit from, it is difficult to see that it could be a justification for fundamental rights protection.<sup>351</sup> As explained, fundamental rights should not step into picture unless essential rights (“essential foodstuff, of essential primary health care, of basic shelter and housing etc...”) are endangered. Moreover, as the purpose of companies by law is to maximize profit, they do not need to work for the interests of democracy or other fundamental rights although this may occasionally (e.g. through freedom of expression) be the case.<sup>352</sup> In principle, it is difficult to see how legal persons need human rights protection.<sup>353</sup> Therefore, it is unclear what, if any, theory extends fundamental human rights protection to legal persons. It is also unclear how that protection should be balanced with other fundamental rights.

### 7.3. LEGAL PERSONS AS OWNERS OF COPYRIGHT AS PROPERTY

Although extending fundamental rights protection to legal persons is challenging, it may be argued that extending it to legal persons owning copyright is even more challenging. As explained, intellectual goods are not comparable to traditional goods. Unlike traditional goods, enjoyment of copyrighted goods does not negatively impact the supply of that good, indeed, the amount may even increase, in the case of copying. Moreover, as it pertains to legal persons, it is even more difficult to see how a corporation as an artificial creation could “peacefully enjoy his possessions” or how this “enjoyment” could be violated by a prosumer who is using content in his/her own home (e.g. by communicating content to the public from his/her bedroom)?

351 See also *Harding, Kohl & Salmon*, p. 45, where they use shopping as an example of an activity that does not need to enjoy fundamental right protection.

352 *Harding, Kohl & Salmon*, p. 42, who also state: “Moral concern [companies] is permitted to the extent to which it increases profits – a contradiction in terms. See also *Bakan* (passim). One could also argue that granting fundamental rights to legal persons would strengthen rule of law (the notion of *Rechtsstaat*), especially procedural rights, as it would provide wider public good by ensuring that the State upholds the rule of law generally. Or one could argue that granting fundamental rights to legal persons strengthen their duties. However, neither of the arguments is convincing. For example, it would not be convincing to grant a right to fair trial to animals on a basis that it would strengthen compliance with the rule of law. The argument of positing fundamental rights to legal persons in order to increase their duties is neither convincing as fundamental right system posits responsibilities for States instead of their subjects. Thus it is difficult to see that granting legal persons fundamental right protection would add their responsibilities, but grant them rights they often do not need. Similarly, it would be difficult to see that granting fundamental right protection to States would strengthen their duties. See in more detail *Harding, Kohl & Salmon*, p. 47 ff.

353 In words of *Harding, Kohl & Salmon* “[T]he era of globalisation has given rise to a growing unease about multinational corporations: far from requiring human rights protection, multinational corporations are a threat to them, largely because they can evade or trade out of governmental regulation simply through their economic power and manipulation of jurisdictions. Granting them human rights worsens the situation rather than alleviates it: it is like taking the sling and stone from David and giving it to Goliath.” *Harding, Kohl & Salmon*, p. 46.



The possibility to conclude transactions regarding the use of works is also a prerequisite of a functional copyright system based on exclusive rights when rights are owned by legal persons. If concluding those transactions is not possible, it is not possible to secure the essential economic rights of right holders even if they are legal persons. Another concern is that legal persons do not always seem to be interested in allowing use, in practice, even in cases where concluding transactions is possible. An understandable reason for this is market control: if someone freely distributing the content of a legal person on the Internet it may damage markets of legal persons elsewhere by, e.g., diminishing sales of CDs. From the viewpoint of fundamental rights, the problem of this approach is that “market control” is not a protected fundamental right. Consequently, it is problematic from the viewpoint of the right to science and other fundamental rights if legal persons are nevertheless able to prevent use by, e.g., extending coercive power through criminal sanctions to homes of private natural persons.

However, it is often possible to ask a legal person for permission to use content on the internet. For example, sending an email to a company in order to obtain a license may be done relatively easily. However, it can be asked whether the terms of the license are reasonable for a prosumer to pay. Indeed, it is possible that the intention of the licencing requirement is specifically to prevent use by giving a price a prosumer cannot pay in order to protect markets. However, if this were the case, the purpose of copyright to secure the rights of right holders through licensing would not be fulfilled. Similarly, the right to science and culture would be endangered if use were not allowed. In other words, right holders would not obtain compensation and the rights of prosumers would be endangered, i.e., we would be “maximizing misery,” as neither legal persons nor prosumers would enjoy their rights. Thus, it may be asked how a relationship between legal persons and natural persons should be understood from the viewpoint of fundamental rights when concluding transactions is possible?

In this respect, as explained in chapter 4.1., separation between human and other rights has also been acknowledged, as it pertains to copyright. This may be read e.g. from General Comment 17: “Whereas the human rights to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, *intellectual property regimes primarily protect business and corporate interests and investments.*”<sup>354</sup> It is difficult to argue that the statement intends for property to be understood as a “better” or “stronger” right than human rights. On the contrary, fundamental rights doctrine

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354 General Comment 17, paragraph 2 (emphasis added). See also *Shaver*, p 133.

implies that humans are at the core of fundamental rights protection. In this respect, it is not surprising that the Finnish legislature has explicitly stated that constitutional protection for copyright “*should be limited only to natural persons*”, which follows the individualistic *droit d’auteur* copyright theory.<sup>355</sup> Similarly, literal reading of the Constitution of Sweden indicates that these protections are specifically for natural persons: “Författare, konstnärer och fotografer äger rätt till sina verk enligt bestämmelser som meddelas i lag.”<sup>356</sup> It would require a more detailed, country-specific examination to evaluate whether this is the case in other European countries. Nevertheless, individualistic *droit d’auteur* copyright theory already suggests that fundamental rights protection should be limited to individual authors as natural persons in any country having it as a starting point.

In this respect, it should be noted that the ECJ decision in the *Aral* case may be interpreted to mean that copyright protection may be expanded to legal persons.<sup>357</sup> In *Aral*, applicants (two cartoonists and an editor) had designed cartoon characters for two magazines, which were bought by company X. Later, the company sold the magazines to an entrepreneur, Z, and the applicants were dismissed. Nevertheless, the applicants continued to use the same characters in another magazine and consequently were sued by Z on the grounds that the applicants were using the same prints Z had bought. In 1992, the Istanbul Civil Court decided that economic rights to artistic materials produced for the first company had been transferred to Z. However, at the same time the court decided that the applicants could use the characters in other magazines, but with other subjects and stories. In its decision the European Commission of Human Rights decided that “intellectual property is covered” and maintained that *there is no interference with the right to peaceful enjoyment of possessions when, pursuant to the domestic law and a contract regulating the relationship between the parties, a judge orders one party to that contract to surrender a possession to another, unless it arbitrarily and unjustly deprives that person of property in favour of another*.<sup>358</sup> Thus, in *Aral* the European Commission of Human Rights has accepted that intellectual property may be protected and assigned. However, *Aral* does not evaluate nature

355 Committee report 1992:4, p. 108 – 109.

356 See Kungörelse (1974:152) om beslutad ny regeringsform, Kapitel 2, paragraph 16.

357 In *Anheuser-Busch (Anheuser-Busch Inc. v. Portugal)* (Appl. no. 73049/01), 11 January 2007, paragraphs 72 – 78) ECHR confirmed that intellectual property application (for a trademark) may also be protected and in *Smith Kline (Smith Kline and French Laboratories Ltd v Netherlands)*, (Appl. no. 12633/87), 4 October 1990, 66 DR 78) the Human Rights Commission considered that a patent, as a personal property being transferable and assignable, was a possession as provided by P1-1 of the ECHR.

358 See *Oguz Aral, Galip Tekin and Inci Aral v Turkey* (Appl. no. 24563/94), 14 January 1998. See also *Dima v. Romania* (App. No. 58472/00), 2005.

of intellectual property in any detailed manner<sup>359</sup> and it is questionable whether the rights of the assignee were protected as fundamental rights. This is because the Commission merely stated in general terms that “intellectual property is covered by Article 1 of Protocol No. 1”. In fact, as the Commission rejected the claim of applicants, it is clear that it did not regard their fundamental rights as having been endangered (although it did not specifically analyse whether the essential rights of the applicant had been endangered). On the other hand, it may be argued that *Aral* allows the legal person owning copyright to enjoy fundamental rights protection especially because the Commission stated that “intellectual property is covered by Article 1 of Protocol No. 1” and entrepreneur Z was considered the owner of content. If this is the case, the remaining problem is that *Aral* does not give us much guidance as it *did not evaluate the position of the assignee Z in any detailed manner*. For example, the Commission does not elaborate at all on whether Z’s “basic/essential interests” had actually been endangered. The clause “unless it arbitrarily and unjustly deprives that person of property in favour of another” also implies that the Commission was more concerned with the fundamental rights of the authors than that of the entrepreneur. In conclusion, it may be argued that *Aral* does not give a clear answer as to how copyright should be evaluated from a human rights perspective. Whichever way the European Court of Human Rights case law of regarding copyright evolves in the future, it may be recommended that it should provide more detailed reasoning regarding the nature of the protection it provides under the label of copyright, especially as an author’s right.

Due to lack of case law specifically analyzing copyright from a fundamental rights perspective, the situation seems somewhat open to debate. The Infosoc directive seems to consider copyright as property in a very formal manner as it gives little, if any, weight to fundamental rights. In fact, regarding the use of content on the Internet, a formal reading of the Infosoc directive implies that a competing societal aim or objective is automatically secondary to copyright, i.e., permission is always needed from a right holder unless an applicable limitation for a prosumer is found, which is problematic to find if whole works are been used on the Internet. Placing a prosumer’s right secondary to copyright is questionable since, if property is always seen as a right outweighing a competing right, the result is that a prosumer is not be entitled to enjoy e.g. his/her right to science and culture unless s/he first obtains a license. In fact, a license should already be asked if a work is posted openly available to the public, even if no content is actually being copied by others. In other words,

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359 See also *Mylly*, p. 208.

also in cases when no economic damage is caused to a right holder, which is the case if no content is ever downloaded, a formal reading of the Infosoc directive still suggests that copyright outweighs competing rights such as the right to science and culture, the right to privacy and the right to life, liberty and security of a person as it pertains to use of content on the Internet as an open network. This is problematic given that it values a certain societal objective in economic terms, provided one obtains a license at all. In short, if use of content without permission is always a crime entitling police action, the value of the right to science and culture, the value of the right to privacy and the value of the right to life, liberty and security of a person would always seem to be the price of the license, even if no actual (or minimal 0,0001 euro) damage occurred to the right holder.<sup>360</sup> Consequently, the situation may be criticized from the fundamental rights perspective as one should not be able to criminalize core areas of other fundamental rights especially when we keep in mind that fundamental rights, including property right, are not unlimited.

It is noteworthy that a formal reading of copyright law also suggests that permission from a right holder is needed *even if the use in question would lead to positive economic results from a right holders perspective* e.g. through network effects. Thus, formal reading of the Infosoc directive enables labeling the prosumer a thief even in cases where a prosumers action economically *benefits* the right holder. If use benefits the economic position of the right holder, why should the prosumer be penalized for damaging the economic interests of the right holder? One could argue that it is in practice problematic, if not impossible, to analyse whether a certain use benefitted a right holder or not. However, rigorous analysis regarding usage situations would be nothing new in the light of traditional, strict, literal reading of copyright laws: one has traditionally needed to rigorously examine whether e.g. a copy has been produced or whether a certain expression exceeds the required level for protection or through a similarity assessment evaluate whether content A is a copy of a content B. Of course, as it was earlier explained, making such evaluations (e.g. to what extent copies of particular works are being produced on certain platforms on the Internet) is often impossible. For this reason, the findings in this chapter suggest that means other than a strict property right approach should be used to secure both the right to science and culture and rights of authors. Conversely, if strict literal reading is followed, it should also be followed in favour of the prosumer.

The aforementioned challenges may also be demonstrated through the principle of proportionality. As explained, enacting a criminal sanction is already an act that may affect the fundamental *property right of a prosumer* as s/he may have to pay

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<sup>360</sup> One could attempt to argue that the problem is merely theoretical if reasonably priced licenses are being offered to prosumers. At first this argument sounds plausible. However, it would still mean that we would be putting a price – even if a reasonable one – to the fundamental rights to science and culture and, as explained, it is difficult to find justifications allowing us to value fundamental rights in economic terms. Fundamental rights simply should not be in the market place. As explained, e.g. the Finnish property right doctrine neither protects material quantities of property as such.

finer if s/he commits a certain crime.<sup>361</sup> Consequently, when we consider that in Finland a license to offer a piece of music for downloading on the Internet may cost only 0,07 euros,<sup>362</sup> it may be asked whether it is proportionate to criminalize an act causing this type of theoretical damage with criminal sanctions/fines. For example, in Finland the minimum petty fine (for jaywalking) is 10 euros. Now, would it be proportionate to criminalize an act causing a theoretical 0,07 euro damage with a 10 euro sanction? In this case the fine of 10 euros would be approximately 142 times larger than the alleged theoretical damage. Thus, the problem related to the reciprocal relationship between copyright and other rights may be seen from the fact that copyright does not acknowledge more lenient forms of penalty (compared with, e.g., theft and petty theft) as it pertains to use of content on the Internet.<sup>363</sup> The costs of fixing the door the police may have break in order to enter a prosumers home is also easily many times more than the theoretical damage caused to a right holder.<sup>364</sup> Furthermore, demanding rigorous respect from prosumers to honour the property of corporations (or even authors) is also questionable when we take into consideration that there are always costs incurred by legal persons themselves when they conduct business: taxes, administrative costs, accounting, costs for recreational activities, charity work, etc. are constantly incurring costs for legal persons (and occasionally authors). From an individual author's point of view, it would also be naive to believe that s/he could (with "zero tolerance") dictate the terms of a contract when assigning his/her rights to a corporate right holder. Even if the economic damage for an author would be more than 0,07 euros, it is clear that the situation is problematic from the viewpoint of the principle of proportionality, taking into

361 As explained, the Constitutional Law Committee of Finland has stated that pecuniary penalty means interfering to the property of the convicted and imprisonment means interfering to a person's right to liberty. Therefore, thorough criminal punishment, the Constitutional Law Committee of Finland has defined that criminal system always touches constitutional rights. Therefore individual criminalizations should always be evaluated as any limitations to constitutional rights as enacting a penal provision requires that general and possible special requirements for limiting constitutional rights should be fulfilled.

362 See e.g. Teosto's pricing-list for Internet use, available (in English) at: [http://www.teosto.fi/sites/default/files/files/P13\\_Download%202013.pdf](http://www.teosto.fi/sites/default/files/files/P13_Download%202013.pdf). Teosto is a composers collecting society in Finland. It should be mentioned that in order to post music performed by others one needs also permission on behalf of performing artists and phonogram producers. Even if it was considered that such a license fee doubles the price it would still be 0,14 euros per song i.e. a lot smaller than a possible fine for jaywalking. It could also be mentioned that according to some sources a popular music service Spotify pays approximately 0,005 euros per download to an author. See Hans Handgraaf, Spotify royalties, available (in English) at: <http://www.spotidj.com/spotifyroyalties.htm>. According to a Finnish author and artist Anssi Kela he received approximately 0,002 euro per stream from Spotify. See Mr. Kela's blogpost Levoton tyttö ja Spotify, on 6<sup>th</sup> of November, available at (in Finnish): <http://www.anssikela.com/2013/11/06/levoton-tytto-ja-spotify/>.

363 It could also be noted that e.g. the Criminal Code of Finland (39/1889) acknowledges such crimes as Unauthorised uses (Criminal Code of Finland, chapter 28, Sections 7 – 9, an unofficial translation available in English at: <http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf>). They define as crimes if traditional property of others is being used without permission. Maximum penalty for Unauthorised use is one year imprisonment. Penalty for Petty unauthorized use is fine. As a right holder may use content at the same time another uses it (the special nature of copyright), punishment for unauthorized use of copyright should in retrospect be smaller than unauthorized use of traditional property. It is curious that this is not the case. Instead the situation seems opposite as even theoretical damage to a right holder may lead to two year imprisonment. This is questionable from the viewpoint of principle of proportionality.

364 It may also be considered disproportionate that a teacher is considered criminal, if s/he occasionally uses content needed for educational purposes although s/he has not obtained a license for it. This applies even when a teacher shows a movie to students for recreational purposes. The situation could be interpreted otherwise if the teacher would constantly use non-licensed content in a manner that more significantly harms economic interests of right holders.

consideration consequent economic damages for the prosumer and the society as a whole: a prosumer cannot work due to his/her imprisonment, which also directly incurs societal costs (police, legal aid, process through the court, imprisonment itself etc). In fact, it seems that the property rights of prosumers and society as a whole is completely ignored in relation to the property of right holders. In this respect, it may be even asked if copyright actually aims to protect concept property at all, as property of some may be completely ignored, or at least seen clearly inferior to the property of right holders. As explained, posting a work openly available on the Internet is considered a crime (“theft”), even when no actual damage has occurred to the right holder, which is the case when no-one downloads the work. In this respect, it seems that copyright legislation has discarded traditional western legal principles such as the principle of reciprocity as presented by Immanuel Kant.<sup>365</sup> (Curiously, this does not prevent right holders and their representatives who benefit from the situation from representing themselves as proponents of civilization and culture, making it rather obscure what type of civilization and culture they represent.)

One could argue that economic harm to a legal person also harms authors behind the legal person, and consequently property of legal persons should always be protected as a fundamental right. However, such claim would face several challenges. Firstly, fundamental rights are relative and urge taking into consideration reciprocal relationship of the parties.<sup>366</sup> Secondly, fundamental rights protect in the first instance natural persons. The protection is provided against actions of States *and* powerful private interests. As some transnational corporations are larger than certain States is difficult to see how they could enjoy fundamental right protection. Even if the doctrine of indirect fundamental rights protection were accepted, in principle it would extend only to smaller legal persons (family businesses etc., see also chapter 7.2. and indirect/derivative protection). However, especially from the viewpoint of *droit d’auteur* copyright theory, which emphasizes individual authors, even accepting indirect protection is problematic. As explained, the Finnish legislature has explicitly excluded legal persons from the scope of fundamental rights protection as it pertains to copyright. Thirdly, it is difficult to read fundamental rights conventions in a manner that prioritizes property over human rights. In practice, one problem of such reading would extend formal

365 Kant’s idea of legal rights and obligations was the following: when a person calls upon his/her rights against another, for reasons of consistency, s/he has to recognize that the other is like s/he is. Thus thorough this recognition a person has to also accept that the other person may have similar rights that should be honored.

366 See Pekka Läsineva, Omaisuuuden suoja (PL 15 §), published in Perusoikeudet, Hallberg (et al), Helsinki 2011, p. 573 and Mylly p. 208 – 212.

and inflexible property protection to legal persons in a manner that would legitimize arguing that even 0,01 euro damage is always a fundamental right problem. It is difficult to see that this is the case as fundamental rights protect certain essential interests. Fourthly, if States were obligated to protect every euro of legal persons as a fundamental right, one should rigorously evaluate each usage situation: did using a certain work on the Internet actually cause damage to the legal person? However, this is impossible in practice, as certain times use may also lead to positive results - not to mention the impossibility to monitor each copy forming on a certain platform on the Internet. Furthermore, if States were obligated to protect each euro of legal persons it would also seem that States were obligated to maintain certain industries regardless of how outdated their business models might be. Is it a failure of a State if a company goes bankrupt? Or how could a State demand legal persons to pay taxes, if each euro of a legal person is protected as a fundamental right? Finally, one should also consider the property (and other rights) of others, as the reciprocal nature of fundamental rights suggest. If the property of others is ignored, it is questionable if we talk of property at all as “property” of right holder would seem to be more protected than property of others. This does not mean that copyright should be ignored. Instead, it means that States should use not use exclusive rights to protect the essential economic interests of authors if it endangers other rights. States may also give financial support to certain industries. Whatever states decide to do, those support mechanisms should not endanger the fundamental rights of others. Of course, one may argue that all the aforementioned challenges are irrelevant and the property of legal persons should always be rigorously protected as a fundamental right.<sup>367</sup> This would make legislation processes generally much easier. For example, we would not have to determine whether e.g. certain activities of mining industry are bad for the environment or to private land owners as the result should directly favor the mining industry regardless of the environmental or economic damages to the land owners. However, if fundamental rights analysis is taken seriously, the presented challenges suggest that methods other than rigorous property approach should be used in order to secure the rights of authors and prosumers.

Finally, disproportionateness of the situation may also be seen from the viewpoint of other fundamental rights. For example, it is difficult to regard using coercive

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<sup>367</sup> In fact, as the threshold for obtaining copyright protection is easily exceeded, it may be argued that all legal (and natural) persons own content protected by copyright. Thus if it is accepted that legal persons owning copyrighted content should enjoy fundamental rights protection it could be argued that all legal persons enjoy fundamental rights protection.



power in the form of criminal sanctions against prosumers based on theoretical economic damage proportionate from the viewpoint of the fundamental rights to life, liberty and security of person as provided by Article 3 of the UDHR. As explained, permission is needed when content is placed openly available on the Internet even in cases where no-one ever accessed the content, i.e., there would be no economic loss for the right holder. Why is such an act considered a crime, threatening a prosumer's right to life, liberty and security of a person? Moreover, if staling a candy bar worth 1 euro may at best (in Finland) may lead to 6 month imprisonment as a petty theft (in practice a small fine would be given), why should stealing a music track worth of 0,07 euros may lead to 2 years of imprisonment? The same question may be extended to the right to privacy as protected in Article 12 of the UDHR: it is difficult to consider it proportionate for a right holder to send police into a person's home based on theoretical or negligible economic damage. In economic terms, in relation to rights of right holders, the right to life, liberty and security of person and the right to privacy seem to carry no value in practice, as it pertains to possibilities to use content in an open environment. Even if the system was *de facto* in the first instance used to protect the essential economic interests of ("ailing") authors instead of corporations, it is difficult to regard it proportionate that even essential interests of ("ailing") authors should be protected through a formal system based on exclusive rights in a described situation. Usually, work for the weak/ailing is conducted through charities or such like work instead of using threat coercive power extending to every private natural person.<sup>368</sup> Why should theoretical or minimal economic damage to an individual ("ailing") author entitle breaching a prosumers privacy and lead to criminal sanctions? Such a situation implies that individual prosumers have no rights at all, or that their rights are less valued than those of the right holders. Consequently, it may be criticised as disproportionate to demand that prosumers should rigorously follow the will of right holders, especially when considering individualistic *droit d'auteur* copyright theory. Therefore, as formal reading of the Infosoc directive does not take into consideration the explained challenges related to fundamental rights, the findings support claims regarding excessive influence of legal persons behind copyright law: neglecting rights of others is consistent with the activities of larger legal persons in their pursuit of profit and power in an amoral manner as described by Harding, Kohl, Salmon and especially Bakan. This leads to some additional concerns, which shall be addressed next.

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<sup>368</sup> One could also contemplate why work of certain people should begin with be protected as human right in comparison to work of others. For example, why should producers of entertainment and science have a special kind of human/fundamental rights protection in comparison to producers of paper, cars or metal? Relevance of the question is emphasized in the information society as we all easily are author's creating protectd expressions. Why should our human or property right be more strongly protected when we are authors in comparison owners of traditional property? This remark is not made as an argument disrespecting rights of authors, but instead as a reminder that property right is not an unlimited right.



## 7.4. CONCERNS

Strict approach of the Infosoc directive implies that little if any weight has been given to fundamental rights analysis when the directive was drafted. As it is also difficult to see that copyright would exist primarily for individual authors and prosumers to conclude individual transactions with each other and it is difficult find reasonably priced licenses for prosumers to copy and make content available on the Internet, it becomes plausible that copyright is being used to *prevent the prosumers from using the content* in order to protect the financial interests of legal persons, especially large corporations. This would imply that exclusive right has been directed against every individual and extended to every home (due to criminal sanctions in the form of coercive power) in order to protect the business interests of certain legal persons. If this is the case, copyright is not applied as intended *de jure*, i.e. as a right protecting in the first instance the essential interests of (“ailing”) authors, as *droit d’auteur* copyright ideology postulates. Moreover, as there would be no actual intentions to *enable prosumers to use the content as postulated* by subsection 1 of the Article 27 of the UDHR, power aiming to prevent use is alarming both from the viewpoint of the right to science and culture as provided by Articles 27(1) of the UDHR and 15(1)(a) of the ICESCR, and from the viewpoint of fundamental rights to life, liberty and security of person as provided by Article 3 of the UDHR and to the right to privacy as protected in Article 12 of the UDHR.<sup>369</sup> However, such use of power would be completely consistent with the amoral nature of corporations in their pursuit of profit and power as described by Harding, Kohl Salmon and especially Bakan.

There are also signs that corporations are using copyright both to protect their interests by preventing use and also to directly benefit from situation by exploiting prosumers who violate copyright. The following case, which was never evaluated in court but received a lot of publicity in Finland, may be used as an illustration of this. In a Finnish case altogether 27 persons (prosumers) had been accused of sharing and copying certain music CDs with each other on the Internet. A record company had monitored the use and claimed 600 Euros from each of the prosumers collecting altogether approximately (600x27) 16.200 euro.<sup>370</sup> However, according to *Temonen*, copying the CD 27 times caused approximately 270 euro damage for the record company (and this also only provided all of the copiers had bought the CD from a legal retail shop), as the retail price of the CDs were 8 – 12 euro per CD (27x10

369 It could be mentioned that an objective of preventing use would also be problematic from the viewpoint what Ridley and Gates agreed as they both considered exchange i.e. enabling use as the key element of innovation. See previously chapter 3.1.2.

370 The reason why the case received publicity was that one alleged copyright violator refused to pay the fee of 600 euro. Moreover, she was allegedly a child (a nine year old girl at the time) whose father declined from paying the fee and signing a Confidentiality Agreement with the record company binding them not to talk about the case. As the case was settled before it ended up to court, no formal court decision was given regarding the actual user.

= 270 euro).<sup>371</sup> Thus, in the light of this example it becomes questionable whether copyright is being used at all to defend the economic rights of (“ailing”) authors, especially because it is questionable whether authors receive anything in these types of processes.<sup>372</sup> Furthermore, it is untenable to argue that it is the prosumers who (as “thieves/pirates”) are benefitting at the expense of right holders in situations such as this. On the contrary it seems to be legal persons who are economically benefitting at the expense of prosumers. As it is clear that 10 euro damage is in no proportion to 600 euro damage claim it may be asked if legal persons as right holders are using copyright as means for unjust enrichment. Creating more effective systems to contact and demand compensations from those prosumers who do not respect formal reading of copyright law would clearly be in the interest of legal persons. Due to the high level of collected compensations in proportion to lost sales (16.200 euro instead of 270 euro) it may become (and perhaps already is) lucrative for corporations to maintain a certain level of piracy, especially if effective means for contacting prosumers existed.<sup>373</sup> Again, this would be completely consistent with amoral aim of legal persons to pursue for profit and power.

## 7.5. CONCLUDING REMARKS

### 7.5.1. IN GENERAL

This book postulates that property should in principle be protected as a fundamental right only when it enables securing the mentioned “basic/essential” human rights objectives such as “essential foodstuffs”, “essential primary health care”, “basic shelter and housing”, “the most basic forms of education,” etc. In other words, the primary objective of fundamental rights, i.e., to secure certain essential interests, and the primary objective of corporations, i.e., to maximize profits, do not correspond with each other. The reason behind the separation of human rights and property right is to emphasise the role of human rights in comparison to property right and not vice versa. Consequently, it would be difficult to see how property right protection could be “better” or “stronger” in comparison to the protection provided by human

371 See See Tuukka *Temonen*, Chisu sydän Len Blavatnik (hereafter *Temonen*), a Facebook –post (hereafter *Temonen*, available at (in Finnish): <https://www.facebook.com/notes/tuukka-temonen/chisu-syd%C3%A4n-len-blavatnik/10151175865123732>. *Temonen* has been an artist in popular Finnish band.

372 Regarding claims that collected compensations are not distributed to authors see also (with references) Ernesto *Van Der Sar*, Music Labels Won’t Share Pirate Bay Loot With Artists, *Torrentfreak*, July 28, 2012, available at: <http://torrentfreak.com/pirate-bay-loot-with-artists-120728/> and *Temonen*. Even if all the 27 CDs had been sold legally in a normal retail trade, the author of the record would have received as royalties approximately 20 euro (4% - 15% royalty per CD of the retail price, which was 8 – 12 euro per CD). See *Temonen*.

373 It could be mentioned the corporation also demanded to sign a confidentiality agreement in order to protect its “privacy” interests while it at the same time it the right to privacy of the prosumers in question: it was not a problem for the record company in question to send two police officers to a home of a private natural person, which completely corresponds with the amoral nature of corporations as described by Bakan.

rights.<sup>374</sup> Seeing property right as a neutral economic instrument, which always has a formal fundamental rights status in relation to other rights, would easily turn into a questionable asset especially in the hands of transnational corporations aiming to maximize profit for their owners. In this regard, it is questionable if right holders even intend to use copyright to make content available to the public on the Internet as postulated by Articles 27(1) of the UDHR and 15(1)(a) of the ICESCR. At the moment, it seems that copyright is intentionally used to prevent use rather than to enable it as provided by Articles 27(1) of the UDHR and 15(1)(a) of the ICESCR. This poses challenges from both the viewpoint of right of authors, as they cannot receive compensations, and from the viewpoint of the right to life, liberty and security of a person and the right to privacy as enshrined in Articles 3 and 12 of the UDHR.

Although the European Convention on Human Rights explicitly states that legal persons are also entitled to the peaceful enjoyment of their possessions, extending fundamental rights protection always in a formal and strict manner to legal persons is challenging. Although it was accepted that the property of legal persons was protected as a fundamental right (in this respect it should be noted that the European Convention on Human Rights does not specify what types of legal persons are protected or to what extent), it may be asked if fundamental rights protection may extend to larger legal persons and especially to transnational corporations. It is difficult to see that transnational corporations are in need of fundamental rights protection to protect their “essential/basic” interests. On the contrary, fundamental rights should protect natural persons against actions of corporations. Indirect protection to smaller legal persons through the essential interests of their protagonists is easier to understand, as the aim of fundamental rights protection is to protect essential interests of natural persons. However, provided *droit d’auteur* copyright theory excludes legal persons from the scope of fundamental rights, extending fundamental rights protection to companies owning copyright would again become problematic. It could be recommended that the European Court of Human rights specify the conditions on which legal persons may earn fundamental rights protection and on the role of individualistic *droit d’auteur* copyright theory in this respect.

## 7.5.2. SUGGESTIONS

The examples in this book indicate how the fundamental rights of prosumers, especially the right to science and culture, have been ignored when the copyright

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<sup>374</sup> See e.g. here chapter 4.1. and General Comment 17, paragraph 1: “Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.”

directive was drafted. This is problematic as traditional content holders such as record companies, broadcasters, publishing houses, collecting societies, etc. should be unable to endanger fundamental rights in a society through criminalization - just as e.g. the paper or mining industries are - even if they argued that they were protecting fundamental rights of (“ailing”) employees.<sup>375</sup> In other words, it is difficult to see that States should have a strict formal obligation to protect as a fundamental property right the unrealized economic benefits of a legal person owning copyright. Property right may also be limited and States have no obligation to maintain certain types of industries or companies. Instead, in the first instance they are obliged to protect the rights of natural persons. It should therefore be incumbent on industries to renew their business models (or suffer losses if unable to do so) in order to avoid placing the fundamental rights of others at risk (or “in the market place”).<sup>376</sup> Alternatively, the legislature could stop balancing different interests in the society and directly decide that a result of the analysis should favor the standpoint of the industry provided that it might even in theory suffer economical damages (as it now seems to be as it pertains copyright). However, as has been explained, this approach would be difficult to accept from a fundamental right perspective. Thus this book argues that the right to science and culture – including a right to make content available to the public in an open society – as an existing human right should be given relevance. How could this be done?

Regarding the reciprocal relationship between prosumers and authors, it was concluded that means other than exclusive rights should be applied in order to secure the right to science and culture and rights of authors.<sup>377</sup> From the viewpoint of legal persons, the situation seems more complex. There clearly seems to be the will to use content often owned by larger corporations. In theory, contacting a corporation should not be problematic. However, from a fundamental rights perspective, one problem related to corporate attempts to hinder prosumers’ use of the content is that it should not be possible to criminalize core areas of protected fundamental rights, such as the right to science and culture. Consequently, if the core area of the right to science and culture is understood as a right to use a limited amount of content at a time, legal persons should not be able to prevent such use even if it takes place in open networks. Thus, at this point fundamental rights analysis and especially the right to science and culture should affect the strict and formal reading of copyright. This means that copyright should acknowledge more lenient or alternative ways to

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375 It could be mentioned that the approach does not prevent States from supporting industries e.g. through different types of support mechanisms. It instead means that fundamental rights should be taken into consideration no matter what type of mechanism is used.

376 Another thing is if there is need and political will to support certain industries (or more plausibly authors) with alternative mechanisms which are not problematic from the viewpoint of fundamental rights of others (compare: aids to shipyards).

377 This should also apply to smaller legal persons, provided fundamental rights protection indirectly extends to them: It simply is difficult to see that prosumers would be able or even interested in constantly concluding individual transactions with individual authors or smaller legal persons.

evaluate such usage situations.<sup>378</sup> In fact, given that exclusive rights of authors have already been limited in the interests of corporations (i.e. broadcasters, press or record companies) allowing the corporations to use content for commercial purposes in public, corresponding limitations in the interests of prosumers using content for non-commercial purposes in public should not be hindered.

Consequently, an alternative solution that enables use and secures compensations for individual authors should be suggested. In this respect, it may first be asked who should be relevant right holders receiving the compensations, as today all prosumers are authors and users. In order to respect individualistic *droit d'auteur* copyright theory and the basic tenets of fundamental rights, focus should be placed on those authors whose content has been used but whose essential economic interests are still at risk. It is difficult to see why relevance should be given to legal persons as they should in principle be excluded from fundamental rights protection<sup>379</sup>, especially from the viewpoint of individualistic *droit d'auteur* copyright theory. However, this does not mean that the system could not extend its effects to individual authors who have assigned their rights to legal persons. For example, if a company uses content but the author of the content (e.g. for contractual reasons) no longer receives compensation, the author may still be protected by fundamental rights. Thus, fundamental rights analysis suggests that the alternative system could be separated from corporate control, although content formally owned by corporations would be used. This would follow the original aim of fundamental rights as protectors of natural persons. The system should have negligible economic effects on legal persons given that the use of content by prosumers (as understood in this book) would allow only limited amounts of content to be used at any given time. Some risk should also be left for legal persons to carry. Examples of how the system could be organized in practice shall be evaluated in chapter 12. The book will evaluate next whether Internet intermediaries could provide solutions to licensing questions between prosumers and right holders.

It should be noted that the suggestion above does not mean that legal persons should always lose when the property of legal persons is compared to rights of prosumers. The suggestion emphasizes analyzing the protected core area of the right to science and culture and comparing it to possible economic damage to a legal person. For example, it would be difficult to see that prosumers rights could not prevail if only small amounts of content are being used and the other

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378 As explained, it is questionable if causing a 0,07 euro damage may be compared to theft. It may further be questioned if it should be defined as a petty theft either. As explained, already 10 euro fine for causing 0,07 euro theoretical damage is over 140 times bigger than the alleged damage. Another thing is if a prosumer uses large amounts of content – i.e. is not anymore protected by the core area of the right to science and culture – and causes more serious damage to a corporation.

379 Excluding smaller legal persons possibly enjoying indirect fundamental right protection.

party is a large corporation suffering only theoretical damage.<sup>380</sup>

Although this book does not focus on evaluating relationships between legal persons, it could be mentioned that if intellectual property is protected as a fundamental right of companies, the principle of equality necessitates that the right to science and culture should also extend its applicability as a fundamental right to legal persons using intellectual property. As explained, private parties in an equal position barely form a constitutional threat to each other. However, an exhaustive list for limitations in the Infosoc-Directive and formal reading of the Orphan works directive again indicates that the right to science and culture has also been ignored in this respect. For example, due to an exhaustive list of possible limitations in the Infosoc directive, the Orphan works directive, referring to point (c) of the Article 5.2 of the Infosoc-directive, allows for the use of orphan works but only for non-commercial purposes.<sup>381</sup> This is not only incompatible with an argument that copyright creates “economic foundation for the creative industry, since it stimulates innovation, creation, investment and production” as recital 5 of the Orphan work directive states, but also raises questions as to why similar commercial services using orphan works such as Google books should be prevented from emerging? It is difficult to see who would lose if commercial use of orphan works was allowed with a possibility for a reappearing author to claim compensation for the use. The reappeared author could afterwards also decide whether s/he would continue distributing his/her content through the service.<sup>382</sup> As there is no information regarding possible numbers of reappearing authors<sup>383</sup>, it is also possible that the problem related to use of orphan works is theoretical.<sup>384</sup>

380 As explained, it may also be asked if one should consider it a crime even if a prosumer uses content of an author as a natural person if it is clear that the author has had no intention of using that certain content in order to secure his/her economic interests? For example, is it proportionate if person A may threaten person B with criminal sanctions if B merely posts a photograph taken by A to B's Facebook profile when A has no intentions to use the photograph in order to secure his/her economic rights? How can A in such case even argue that s/he is using his/her copyright to protect his/her essential economic interests i.e. what the core area of the copyright protects?

381 According to Article 1 of the Orphan works directive use is allowed “publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, in order to achieve aims related to their public-interest missions.”

382 If a reappearing author would decline from licensing his/her motives should be other but economical as his/her motives from declining are obviously other but obtain compensations through licensing. Nevertheless, in an author – legal person relationship s/he the principle of equality suggests that his/her will should be respected although in theory one should evaluate whether his/her essential interests are endangered if the use is allowed.

383 For example, Commission Staff Working Paper, Impact Assessment on the Cross-Border Online Access to Orphan Works, Brussels, 24.5.2011, SEC(2011) 615 final, does not even attempt to estimate amounts of reappearing authors in practice.

384 It may be assumed that only minuscule amounts of reappearing authors wanting to opt out from the system would exist. For example, in Finland there are several paragraphs in law for collective licenses i.e. for those situations when individual licensing is deemed impossible. However, as not everyone assigns their rights to collecting societies granting collective licenses, Nordic collective licenses may have an extended effect covering also those right holders who have not assigned their rights. In order to secure position of these non-affiliate authors a separate right to opt-out from the collective license and a right to claim compensations for the use have been granted to non-affiliate authors. However, only minuscule amounts of non-affiliate authors even attempt to opt out from the license or claim compensations. As orphan authors are not organized in any way either, it is questionable whether the problem related to use of orphan works is actually that significant. Regarding the position of non-affiliates in more detail, see Olli Vilanka, *Rough Justice or Zero Tolerance? – Reassessing the Nature of Copyright in Light of Collective Licensing* (Part I), chapter 4.3, published in *In Search of New IP Regimes*, a publication of IPR University Center, Helsinki 2010.

## 8 POSITION OF INTERMEDIARIES

### 8.1. IN GENERAL

It may be asked whether Internet intermediaries, including firms such as Internet operators and search engines, should be held liable for use of content conducted by others, especially prosumers. It could also be asked whether the intermediaries might ask permissions *on behalf of prosumers* to make content available to the public as Article 27(1) and 15(1)(a) of the ICESCR postulates. Thus, it shall next be evaluated what an *intermediary* is, if it is *not a user* copying and making content available to the public as the copyright theory postulates. After this, it shall be evaluated on what possible liability of intermediaries could be based on, if intermediaries do not produce copies or make content available to the public as users do. Finally, it shall be evaluated whether intermediaries might ask permissions from authors on behalf of prosumers, if they are held liable for acts conducted by prosumers.

### 8.2. DEFINING INTERMEDIARIES

If intermediaries are not users, it may first be asked what they are, i.e., how should they be defined? In Europe a starting point for possible liability of intermediaries is often derived from Directive 2000/31/EC on electronic commerce (hereafter E-commerce Directive), which covers both natural and legal persons.<sup>385</sup> The E-commerce directive also refers to the Directive 98/48/EC and its definitions of services.<sup>386</sup>

The services described by the directives especially refer to services in electronic form. Consequently, delivery services related to goods and services not conducted by electronic means have been excluded from the scope of the directives.<sup>387</sup> In addition, annex V of Directive 98/48/EC excludes services which are not provided “at a distance” although electronic services were present. In these cases the customer is

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<sup>385</sup> See Directive 2000/31/EC of the European Parliament and of the Council, of 8 June 2000, on certain legal aspects on information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce). See especially recital 50 of the directive connecting it to directive on “harmonisation of certain aspects of copyright and related rights in the information society” (which later became so called Infosoc-directive. Regarding subjects of rights see Article 2(b) of the E-commerce directive.

<sup>386</sup> See the reference in Article 2 a) of the E-commerce directive and in general Directive 98/48/EC of the European Parliament and of the Council, of 20 July 1998, amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations.

<sup>387</sup> See Article 2 (h) ii of the E-commerce Directive.



physically present although electronic services were used (e.g. medical examinations or treatment at a doctor's surgery using electronic equipment where the patient is physically present).<sup>388</sup> Thus, in general the scopes of the directives seem to cover services in electronic form which are provided at a distance.

More detailed elaborations have also been given. Article 2 of the E-Commerce directive (referring to directive 98/34/EC as amended by Directive 98/48/E) defines that an "*information society service covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.*"<sup>389</sup> Recital 18 of the E-commerce Directive continues that: "Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; ... services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service." Also, "services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail" are listed as information society services in the Recital 18 of the E-commerce directive.<sup>390</sup> Finally, recital 28 of the E-commerce directive adds postal services "consisting of the physical delivery of a printed electronic mail message" and "voluntary accreditation systems, in particular for providers of electronic signature certification service" to relevant services. Thus we may see that a definition for a service as defined in the directives is wide and leave a lot of room for interpretation.<sup>391</sup> Nevertheless, it may be summarized that the services provided by E-commerce directive cover *services at a distance by means of electronic equipment for processing and storage of data* although as an exception to the rule delivering printed electronic messages have also been included.<sup>392</sup>

It could be mentioned that in legal literature such services as operators and search engines have often been considered as intermediaries.<sup>393</sup> *Spindler, Riccio* and *Van Der Perre* have listed the following actors as intermediaries: "Mere conduit, Caching, Host providers and Auction platforms, Search Engines and Hyperlinks, Blogs and Forums, Content aggregators, Domain name providers and Registration authorities, Admin-C and online-payment providers, Gambling specific issues."<sup>394</sup> It

388 In more detail see a non-exhaustive list of examples in Annex V of the Directive 98/48/EC.

389 See also Recital 17 of the E-commerce directive for specifications.

390 See recital 18 of the E-commerce directive.

391 See also *Pihlajarinne*, p. 90 – 91.

392 See recital 17 of the E-commerce directive and Article 1(2) of the Directive 98/48/EC.

393 See e.g. *Pihlajarinne* (passim).

394 See Gerald *Spindler*, Giovanni Maria *Riccio* and Aurélie *Van Der Perre* (under the direction of the professor *Montero*): Study on the Liability of Internet Intermediaries (Markt 2006/09/E, Service Contract ETD 2006/IME2/69). Thibault



is also difficult to see what would prevent adding to the list social media platforms (Facebook), P2P-software, different types of e-mail and messaging services, services providing platform and software for prosumers to record and watch (later) television broadcasts etc. Consequently, we may see that it is difficult to give an exact definition for a service that qualifies as an intermediary. For example, the listed services in legal literature do not seem to follow any technologies as such since it is difficult to see that “mere conduit” could be technology at all.

Due to technological convergence it might also be difficult to make required definitions dependent on specific technologies. Therefore it could be contemplated, following a basic separation between software and hardware<sup>395</sup>, if those who 1) offer platforms of their own for others to use (“electronic equipment for ... storage of data”) or 2) offer software of their own to others to use (“electronic equipment for processing ... data”) or 3) do both 1 and 2 at the same time would qualify as intermediaries.<sup>396</sup> The problem of this approach is that it is possible and even likely that intermediaries acting in this manner are merely offering their own property for others to use. One does not need to understand this only as “traditional property” such as a piece of a hardware, but also as intellectual property, e.g., in the form of software obtaining copyright protection. For example, several search engines use the ©-sign although its use not necessary for obtaining copyright protection.<sup>397</sup> Thus, a challenge is that it would be paradoxical to require intermediaries to stop using their own property through an argument that they are in fact using someone else’s (i.e. right holder’s) property.<sup>398</sup> Such a requirement would lead to asking whether one attempts to change the concept of property. In other words, the problem related to the copyright liability of intermediaries is that it is difficult to define intermediaries as copiers or communicators of content if they merely provide platforms and services of their own for others to use. Thus, as any electronic service at a distance suitable for storing or processing electronic data (including delivering printed electronic messages seems) may fulfill the definition of an intermediary, courts seem have wide discretion when they decide what an intermediary is. Whether other norms in the E-commerce directive provide more specific definitions for basis of possible liability of intermediaries shall be evaluated next.

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Verbies, ULYS, p.7, available at: [http://ec.europa.eu/internal\\_market/e-commerce/docs/study/liability/final\\_report\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf).

395 For more detailed definitions of software and hardware see e.g. Wikipedia at: <http://en.wikipedia.org/wiki/Software> and [http://en.wikipedia.org/wiki/Computer\\_hardware](http://en.wikipedia.org/wiki/Computer_hardware). See also definition of Computer Hope at: <http://www.computerhope.com/issues/ch000039.htm>.

396 Nothing of course prevents intermediaries also from directly creating copies (or in communicational terms: initiating acts of communication) of expressions owned by right holders and make them (further) available to the public as postulated by copyright theory. However, if they do so it is clear that they do not act as intermediaries but users of content.

397 Homepage and software of the notorious Pirate Bay also easily exceeds required level for obtaining copyright protection, if so argued. It could also be mentioned that the Pirate Bay as such is not problematic for right holders either: it is problematic only because it is used by prosumers in a manner, which is not desired by right holders.

398 As explained, in Finland Pihlajarinne already talks of “concept crisis” as she evaluates possible liability of linkers as intermediaries. See *Pihlajarinne*, p. 15.

### 8.3. “LIABILITY OF INTERMEDIARY SERVICE PROVIDERS”

If we have a consensus that a certain actor is an intermediary, the next question to examine is on what the claimed liability of intermediaries is based, if intermediaries themselves do not produce copies or make content available to the public as copyright theory postulates. In other words, if intermediaries were users, no definitional problems would exist as they would not be intermediaries but users. Consequently, if intermediaries are separated from users, it becomes relevant to define on what their possible liability is based on.

In this respect, it must first be noted that the headline of this chapter, which is also the headline of Section 4 of the E-commerce directive, clearly indicates that intermediaries may be held liable. However, from the perspective of copyright, the E-commerce directive does not enact any new economic rights for authors. Neither does it specifically amend the old ones.<sup>399</sup> Thus it needs to be evaluated on what possible copyright liability of intermediaries could be based on.

Although the headline of Section 4 of the E-commerce directive indicates that intermediaries may be held liable, none of the articles (12 – 15) under it define any new right or amend old rights granted for copyright holders. *Instead, on the contrary, all articles under the headline define exemptions for intermediaries from possible liability.* For example, Article 12 exempts under certain conditions services that provide access and enable communication of recipients of the service in networks.<sup>400</sup> Article 13 (for ‘Caching’) exempts under certain conditions services making transmissions in communication networks conducted by recipients of the service more efficient by temporarily storing the transmitted information.<sup>401</sup> Article 14 on certain conditions exempts services that consist of the storage of information (‘Hosting’) for recipients of the service.<sup>402</sup> It could also be mentioned that both Articles 13 and 14 provide that Internet Service providers are not liable if they expeditiously remove or disable access to information after they have obtained actual knowledge regarding the unlawful nature of the information. Article 15, on

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399 For example, when the Infosoc directive was implemented in Finland it was specifically stated that no new measures or rights were introduced under the scope of already existing exclusive rights. See Government Bill 28/2004, p. 77.

400 Service providers under Article 12 of the E-commerce directive are exempted if it a) does not initiate the transmission, b) does not select the receiver of the transmission; and c) does not select or modify the information contained in the transmission. See Article 12 of the E-Commerce directive.

401 These service providers are exempted on condition that a) the provider does not modify the information, b) the provider complies with conditions on access to the information c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry, d) the provider does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; and e) the provider acts expeditiously to remove or disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement. See Article 13 of the E-commerce directive.

402 Services are exempted under Article 14 of the E-Commerce directive, on condition that a) the provider does not have actual knowledge of illegal activity or information and; as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

the other hand, provides that Intermediaries do not have a general obligation to monitor the communication processes conducted by recipients of the services.

Thus neither the headline nor the Articles under the section 4 of E-commerce directive specifically define any new exclusive rights extending copyright liability to intermediaries. *In this respect it seems that the headline of the section 4 of the directive furtively attempts to expand scope of copyright protection by granting intermediaries exemptions from liability without defining on what the liability is based on in the first place.*

It is clear that this type of unclear extension of rights is problematic as it is difficult to see that a mere sentence in the headline of Section 4 of the E-commerce directive stating “liability of intermediary service providers” could be clear enough to define *when* intermediaries should be held liable especially when we keep in mind that it is already somewhat unclear who intermediaries are to begin with. For example, it might be asked again what intermediaries should do regarding their own property, if they are held liable.<sup>403</sup> Should they limit or stop using their own property through an argument that they are using someone else’s property? If so, does such a court ruling change the concept of property if an intermediary is banned from using merely his/her own property (or forced to amend his/her own software)? In other words, obscure expansion of possible liability to intermediaries causes a phenomenon, which in the words of *Pihlajarinne* may be described as a “concept crisis”.<sup>404</sup> It is clear that the situation is problematic also from the viewpoint of legality principle of criminal law necessitating, *inter alia*, that norms stipulating criminal liability should be clear and ascertainable.<sup>405</sup> To the extent “liability of

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403 As explained, several search engines use the ©-sign although it is not necessary for copyright protection. In fact, also homepage and software of the notorious file sharing service The Pirate Bay easily exceeds required level for copyright protection. In case (2010:47, “The Finnish Pirate Bay”) the Supreme Court of Finland described that the respondents had maintained a “web/net” instead of speculated whether the service could be considered as property in itself although programming and www-page of the service most likely easily exceeded required level for copyright protection. The Supreme Court in Finland neither accepted that the respondents could have avoided the responsibility by removing illegal information as provided by the E-commerce directive. This leaves it open whether services such as YouTube are legal in Finland or not.

404 See *Pihlajarinne*, p. 15. Also Ole-Andreas Rognstad has suggested that it might be reasonable to resign from operating with concepts such as reproduction and making content available to the public. See Ole-Andreas Rognstad, *Opphavsrettens innhold i en multimedieverden – om tradisjonelle opphavsrettsbegrepers møte med digital teknologi*. Nordisk Immateriellt Rättskydd 6/2009, p. 540–543.

405 It could be mentioned that recital 54 of the E-commerce directive provides that “Member States are not obligated to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive.” This has not prevented member states from applying criminal sanctions. In the Swedish Pirate Bay case (see e.g. Svea hovrätt case B 4041-09 and case no. B 13301-06T of the District Court of Stockholm) and its Finnish equivalent (Supreme Court case 2010:47) the courts considered that the services providers were accomplices to committed crimes. In Sweden intermediaries were considered to aid and bet a crime whereas in Finland they persons were considered to be directly involved with the crimes committed by others. Thus in both cases liability was reasoned through acts committed by others with the help of criminal law. Thus the problem of the rulings from the viewpoint of legality principle is that criminal law does not expand economic rights of authors. The challenge of the decisions may be especially seen when evaluating protected expressions through traditional formal/casualistic reading of copyright law: As in theory even one word may exceed required level for copyright protection the decisions are clearly problematic from the viewpoint of legality principle as both of the services easily exceed required level for copyright protection. This reveals how courts have neglected to address the cases from the viewpoint of the respondents as it is unclear what respondents should do with their own property after the convictions. Moreover, it remains unclear how the cases could be addressed e.g. in arbitral tribunals, which as a rule

intermediary service providers” is accepted, it seems that economic rights of authors are accordingly being expanded in an obscure way to intermediaries who have not traditionally been regarded as users.

Services providing platform and software for prosumers to record and watch (later) television broadcasts over Internet may be used as a concrete example related to the problem of defining possible liability of a possible intermediary. Firstly, it is possible to consider that a prosumer using such service merely produces a private copy on the platform offered by the service provider. If the platform has not been defined to belong under the scope of a platform fee system, such use would not be relevant from the viewpoint of copyright at all. Secondly, if it is considered that the platform fee system extends to these platforms, prosumers should pay compensation for the use. Thirdly, if it is regarded that prosumers are not liable for using the service, it may be asked if the service provider is as an internet intermediary who should be held liable instead. If this is the case, it may be asked if it could exempt itself from liability as an intermediary by complying with a request to expeditiously remove or disable access to information after having obtained actual knowledge regarding unlawful nature of the information. Alternatively, it could be asked if the service provider is a normal user who needs permission from a right holder without possibilities to exempt itself from liability as an intermediary.<sup>406</sup> Traditional strict and literal reading of copyright postulates that in order to determine who is liable one should rigorously evaluate whether the copies are being produced by individual prosumers or the company in question.

Finally, if we regardless of the mentioned problems consider that intermediaries should be held liable due to acts committed by others such as prosumers, the remaining question to be answered is whether they could obtain permissions from

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are unable to apply criminal law. It should also be noted that the Pirate Bay and similar services are not problematic for right holders as such: they are problematic only because they are used by prosumers in a manner, which is not desired by all right holders. It could also be noted that Article 8(3) of the Infosoc directive obligates Member States to “ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.” However, it is difficult to see such injunctions as extensions of economic rights of authors.

406 In the last case, it easily becomes problematic for the service provider to ask adequate permissions (especially as the Infosoc directive prevents enacting new limitations for new forms of commercial use). This is because no company acting in a described manner would be able to constantly ask permissions on behalf of each of its individual user wishing to record a certain tv-program broadcasted from a certain tv-channel. For this reason if services such as these are considered directly liable, copyright law does not function as postulated as it would be impossible for users to use content. This would mean that users were unable to operate and no right holder to obtain compensations. It would also mean that members of the society could neither benefit from these types of services. In such situation we would indeed be “maximizing misery”.

right holders on behalf of prosumers who use their services. Evaluating this question is especially relevant when examining the possibilities to secure the rights of authors and the right to science and culture as provided by Article 27 of the UDHR and 15 of the ICESCR.

#### **8.4. POSSIBILITIES OF INTERMEDIARIES TO ASK PERMISSIONS ON BEHALF OF PROSUMERS**

At first it should be remembered that if intermediaries had to ask permissions for themselves, they would be users rather than intermediaries. Thus, the question that shall be evaluated is whether use of content by prosumers in the services of intermediaries could be enabled through contracts between intermediaries and right holders. The theoretical challenge related to this type of solution is that as prosumers would not be directly parties to these contracts. Consequently a norm liberating a prosumer from copyright liability – including possible criminal sanctions – would not be provided by law or a fundamental right such as Article 27(1) of the UDHR. Instead it would come from a contract between two private entities, which often are large corporations. This would literally question the meaning of such rights as provided by e.g. Article 27 of the UDHR and 15 of the ICESCR as private entities would decide whether certain acts of prosumers are legal or not.

Nevertheless, one could consider that the problem remains theoretical if intermediaries and right holders could in practice conclude transactions enabling prosumers to use content on the services of the intermediaries. Certain intermediaries have also concluded contracts regarding use of content on the service of the intermediary. These contracts have been concluded between intermediaries and corporations owning rights to larger quantities of content and consequently do not represent individual authors directly. For example, Google/YouTube has concluded contracts with certain record labels and collecting management organizations regarding use of music videos.<sup>407</sup> Thus, it may be asked whether these types of contracts could enable prosumers to use content on the services of the intermediary.

As no researcher is able to go through all possible contracts intermediaries may have concluded with right holders (even if allowed), possible legal structure of such contracts may at best be generally estimated. Firstly, if a contract addresses merely relationship between an intermediary (e.g. YouTube) and a particular right holder (e.g. a record company) to use the right holder's content on a platform provided by the intermediary, a prosumer is not a party to the contract as the contract has been concluded between an intermediary and a right holder. Thus the right holder itself

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<sup>407</sup> See e.g. Wikipedia for YouTube, available at: <http://en.wikipedia.org/wiki/YouTube> and Vevo, available at: <http://en.wikipedia.org/wiki/Vevo>.

should be the broadcaster/user using services of the intermediary. An intermediary cannot be the user/broadcaster as it would make it the user instead of being an intermediary. Thus, in practice, in this type of solution the intermediary and the right holder would merely have a contract regarding the use of the platform and software of the intermediary. Consequently, this type of solution could not solve problems related to possibilities of prosumers to make content available to the public. Another thing is if the right holder allows prosumers to post same content on the platform of the intermediary. In such a situation the right holder grants an implied license to the prosumer who would be the user in question i.e. it would not be the intermediary asking permission on behalf of the prosumer.

Secondly, one may contemplate if intermediaries should ask permissions from right holders on behalf of prosumers. Although the idea may sound appealing it would face certain practical challenges to outcome. This is because, if the Internet is understood as an open network which may be joined anytime by anyone, it is questionable how any intermediary could obtain information *before* the prosumer posts a certain piece of content onto the service of the intermediary. It simply is difficult to see how any auction platform provider, search engine, blogger, social media platform or a content aggregator could know what content shall be posted onto its servers in the future in order to ask necessary permissions beforehand from adequate right holders. It could be argued that an intermediary should allow posting content on its service only after moderation/filtering process. However, if that is the case, the service is not open but closed in its nature contrary to how the Internet as an open network has been understood in this book.

Moreover, even if intermediaries such as YouTube could obtain proxies from all individual prosumers who in future shall post content of certain rights holder onto their services, the next challenge would be reaching all the relevant right holders in order to ask permissions and distribute compensations to them accordingly.<sup>408</sup> Moreover, although contacting right holders owning large quantities of content should not be problematic, there would be major problems as it pertains to contacting the rest of the right holders, especially globally. Keeping in mind that in an information society we all are easily right holders, the problems of requiring individual permissions becomes evident: intermediaries should in theory constantly ask beforehand permissions from everyone as it is possible that everyone's content may be used on the services of the intermediary in the future. Or vice versa, it is difficult to see how we all as right holders could constantly grant licenses to intermediaries in order that others could possibly post our content on the services of the intermediary in the future. Therefore, it is difficult to see how any intermediary

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<sup>408</sup> In theory permissions should be constantly asked e.g. from each individual artist, lyricist, composer etc of each band whose music is being posted on YouTube, which obviously would be an impossible task in practice.

could comprehensively ask prior permissions on behalf of right holders as it pertains to use of content in open networks.

## 8.5. CONCLUDING REMARKS

Due to the challenges of defining who intermediaries specifically are and when they should be held liable for possible copyright infringements it shall be argued that extending liability to intermediaries largely seems to be a political problem. Challenges related to the situation can in practice be seen from the variety of case law drawing to different directions.<sup>409</sup> It simply is challenging to claim that a mere clause “Liability of Intermediary Service Providers” could sufficiently define who and when should be held liable. It is also difficult to see that intermediaries could ask prior permissions on behalf of prosumers willing to use content on their services in open networks as it is difficult to see how an intermediary could ask necessary permissions before a certain prosumers uses certain content. If masses of information are being used through the service of the intermediary it would also become a challenge to distribute adequate remunerations to adequate right holders.<sup>410</sup> The situation is challenging also from the viewpoint of the legality principle in the criminal law and from the viewpoint of the right to privacy and freedom of expression. Whether tools for collective administration of content provide functional solutions for prosumers to obtain permissions in order use content on the Internet shall be examined next.

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409 See e.g. Cédric Manara, Searching for a Coherent Copyright Regime in the Area of Search Engines, IPRinfo 5/2010, available at: [http://www.iprinfo.com/julkaisut/iprinfo-lehti/lehtiarkisto/2010/IPRinfo\\_5-2010/fi\\_FI/Searching\\_for\\_a\\_Coherent\\_Copyright\\_Regime\\_in\\_the\\_Area\\_of\\_Search\\_Engines/](http://www.iprinfo.com/julkaisut/iprinfo-lehti/lehtiarkisto/2010/IPRinfo_5-2010/fi_FI/Searching_for_a_Coherent_Copyright_Regime_in_the_Area_of_Search_Engines/). Regarding various cases see also Pihlajarinne (passim).

410 In case one does not accept the above analysis it may be suggested that a minimum requirement for possible liability of internet intermediaries is that they fail to comply with a request to expeditiously remove or disable access to information after they have obtained actual knowledge regarding unlawful nature of the information.

## 9 COLLECTIVE ADMINISTRATION OF CONTENT AND FUNDAMENTAL RIGHTS

Collective administration of content may be divided into collective licensing and so called platform fees. This chapter evaluates Nordic collective licenses from the viewpoint of fundamental rights whereas platform fees shall be evaluated in the light of fundamental rights in chapter 11.

### 9.1. COLLECTIVISTIC STANDPOINTS AND COPYRIGHT

#### 9.1.1. IN GENERAL

When evaluating the collective administration of copyrighted content it should first be noted that collective administration of content is already by definition opposite to individual administration of content. In theory, collective administration of content as a complete opposite to individual administration should consist of a single collective body administering – “owning” – all kinds of works. If such a collective system was based on exclusive rights, every member of the information society should ask permission from the collective in order to use publicly any expression exceeding required threshold for protection. As there would be no individual rights, the collective could distribute collected compensations as it would see fit. Moreover, in a society where everyone is a creator and user of content (although they would do not own rights to their productions), a collective would also need to have the power to oversee everyone’s use of expressions. Otherwise an exclusive right to administer expressions would remain a theory. Through extensive supervision over used expressions – possibly even singular words – this type of society would easily end up resembling the society as described by *Orwell* in Nineteen Eighty-Four.<sup>411</sup> It could be mentioned that the situation would be quite similar even if there was several collectives administering expressions from different fields of art or science. The role of individuals would still remain irrelevant although there would be more than one collective administering use of expressions.

However, no collective copyright theories exist in the Western countries. However, “collectivistic standpoints” have been favored elsewhere. According to *Kivimäki* especially countries where democratic state systems were replaced by absolute systems favored limiting exclusive rights of authors on collective grounds.<sup>412</sup>

411 See George *Orwell*, Nineteen Eighty-Four, London 1949. See also Wikipedia for Big Brother (Nineteen Eighty-Four: available at: [http://en.wikipedia.org/wiki/Big\\_Brother\\_%28Nineteen\\_Eighty-Four%29](http://en.wikipedia.org/wiki/Big_Brother_%28Nineteen_Eighty-Four%29).

412 Kivimäki was a professor of civil law, but also the prime minister of Finland from December 1932 to October 1936. In



For example, National Socialists in Hitler's Germany and the old Soviet Union saw copyright more as a socially bound collective right.<sup>413</sup> Välimäki has described the system in the former socialist countries in the following way:

“In large scale collective compensation systems were used in the former socialist countries where they covered basically all kind of works. Although it is difficult to judge the relevance of socialist copyright to the recent discussion on digital copyright, it is interesting to learn how their system was designed. In Soviet Union authors were compensated according to royalties set in the government regulation. Factors that affected the royalty rate of e.g. books were its length, genre, copies printed, and the quality determined by the state. Royalty rate didn't depend on the price of copies sold. The soviet system aimed to compensate authors as other workers based mainly on the quality and quantity of their output. Unfortunately, the system didn't work in practice that way. Secondary issues like the number of characters in the work became sometimes determining factors. There was also clear incentive to overprinting. Nor was the system equal; in practice some well known and government favoured authors were exempted from the state set schedule and received higher royalties compared to others. So while the pricing system based on private royalties might not work optimally, it is difficult to find any historical evidence supporting collective compensation systems either.”<sup>414</sup>

Due to the problematic features related to collective administration in the light of individualistic copyright theory it is not surprising that copyright law's preliminary material and legal literary in Finland has often regarded with criticism collective licenses, which are one form of collective administration.<sup>415</sup> Kivimäki even stated

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1948 he wrote the first comprehensive book (“Tekijänoikeus” or “Author's Right” if translated into English) evaluating copyright and theories behind it. For long time it has also been the only one describing individualistic and collective theories in Finland in more detail. See *Kivimäki*, p. 60 ff.

413 *Kivimäki*, p. 65–67.

414 Mikko Välimäki, a doctoral dissertation: *The Rise of Open Source Licensing. A Challenge to the Use of Intellectual Property in the Software Industry*. Turre Publishing, Helsinki 2005. In his book Välimäki refers to Michael A. Newcity, *Copyright Law in the Soviet Union*. Praeger Publishers, New York, 1978. It could be mentioned that Kivimäki does not elaborate collective theories in more detail.

415 For example, Haarmann has stated that the second legal committee of the parliament barely dared to accept government's proposal for a collective license in photocopying. In the report the committee among other things stated that “for now one has not been able to provide a better functioning system than the contractual license system”. See Pirkko – Liisa Haarmann, *Tekijänoikeus & Lähioikeudet*, 1999 and Committee Report 13/1980 (II LaVM 13/1980). See also dissenting opinions of Markku Tynnila and Matti Anderzén (where they required evaluating their principally problematic features of the contractual licensing system and criticized the law for becoming more detailed and confusing) in Committee Report 1990:31. Finally see a letter 18.2.2003 of The Committee for Education and Culture where it specifically stated to the Ministry of Education that questions related to the extensivity of the contractual licensing system should be reconsidered. See also Martin Kretschmer, *The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments*, E.I.P.R Issue 3, Sweet & Maxwell Limited (2002), p. 132 – 135. It should be mentioned that

that copyright system is in crisis, if collective administration systems are being introduced.<sup>416</sup>

Despite the theoretical problems related to collective compensation mechanisms, their use have increased in the wake of technological development. Consequently, it may be asked how collective administration of copyrighted content has been conducted in practice as opposite to individual administration and how power used through collective administration posits itself from the viewpoint of fundamental rights.

## 9.1.2. BACKGROUND IN NORDIC COUNTRIES

Following the international conventions and *droit d'auteur* copyright theory, a starting point in the Nordic countries are exclusive rights granted to individual authors. No theory for collective rights or administration has been introduced. Nonetheless, collective licenses exist in the Nordic countries. They have been founded due to *practical reasons* in cases where it has been regarded impossible for individual authors and users to conclude direct transactions with each other.<sup>417</sup>

This is noteworthy as from the viewpoint of fundamental rights impossibility to administer use of content individually already questions foundations for granting exclusive rights to individuals as natural persons. In short: why should people honor fundamental rights protection based on exclusive rights granted to individual authors, if an assumption is that it is impossible for individual authors to enjoy those exclusive rights in order to secure their essential economic interests? In other words, the impossibility of individual administration as a justification for collective licensing creates a paradox related to collective administration, which derives power from rights granted to individuals.<sup>418</sup> This leads to asking how collective licensing has been legally justified.

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Kretschmer does not specifically examine the Nordic collective licenses, but presents his criticism in general on a more theoretical level.

416 Kivimäki, p. 66–67, especially footnote 4 where he described the effect of collective licenses in the following way: “Without intention to deny that author’s economical interest may become reasonably compensated through a compulsory license and royalty system, one cannot admit that after enforcement of the mentioned or comparable arrangements, the author whose work may be reproduced against his will, would be the master of his work, which is the idea the Berne Convention is based on.” Although Kivimäki refers by name only to compulsory licenses, it may be understood that he refers also to contractual licenses (containing an exclusive element) when mentioning “or comparable arrangements” sine when Kivimäki’s book was there were no paragraphs in the Nordic copyright laws regarding contractual licensing i.e. the term was not in use at the time (1948) when Kivimäki wrote his book.

417 See e.g. Government Bill 23/1960, p. 3 – 4 and Government Bill 28/2004 vp., p. 62. Koskinen-Olsson, p. 284, WIPO, Collective Management of Copyright and Related Rights, Geneva, p. 3–4, available at: [http://www.wipo.int/freepublications/en/copyright/450/wipo\\_pub\\_450cm.pdf](http://www.wipo.int/freepublications/en/copyright/450/wipo_pub_450cm.pdf), Vilanka, p. 140 – 141 and Mihály Ficsor, Collective Management of Copyright and Related Rights, WIPO Publication No. 855 (E) (hereafter Ficsor), p. 16 and similarly Mihály Ficsor, Collective Management of Copyright and Related rights from the Viewpoint of International Norms and the *Acquis Communautaire*, published in Collective Management of Copyright and Related Rights, second edition, (eds.) Daniel Gervais, Kluwer Law International BV 2010 (hereafter Ficsor II), p. 29–30. See also Gervais 2010, p. 4.

418 Consequently it is not surprising when Martin Kretschmer (who does not specifically examine Scandinavian collective

The foundations of Nordic collective licenses lay on the *freedom of contract*, which is also accepted in recital 30 of the Infosoc Directive stating that: “The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licenses, without prejudice to the relevant national legislation on copyright and related rights.” In other words, the basic assumption in the Nordic collective licensing systems is that a right holder accepts that individual administration of rights is impossible and assigns his/her rights to a collective management organization (CMO). The paradox created by the arrangement is that formal reading of copyright law does not make any difference regardless of whether the right holder is a CMO or an individual author.<sup>419</sup> In the assignment contracts, CMOs also reserve wide rights from individuals to decide about the use of assigned rights in order to grant licenses to users although collected compensations should be distributed to individuals.<sup>420</sup> As a result, users ought to obtain necessary permissions and individual right holders should receive compensations. Provided this happens, collective licenses fulfill their task as they benefit both the individual right holders and the users.<sup>421</sup>

Functional collective licensing arrangements have also existed. In this respect it is not surprising that also recital 18 of the Infosoc Directive refers to a possibility of extended collective licensing. However, it is still unclear whether freedom of contract enables us to grant fundamental rights protection to collective administration in a similar manner as individual authors are protected. Consequently the role of collective management organizations in relation to individual authors shall be examined next.

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licenses but collective administration in general) states that: “the collective administration of [...] copyrights does not straightforwardly reflect a single underlying concept of private property – perhaps not even a notion of copyright as property.” See Martin Kretschmer, *The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments*, E.I.P.R Issue 3, Sweet & Maxwell Limited 2002, p. 132 – 135. See also Kivimäki who stated that adopting collective licensing systems would lead to the crisis of the individualistic copyright system. See Kivimäki, p. 66 and especially footnote 4.

419 However, it should be noted that other regulations such as e.g. competition law may set limitations to activities of CMOs.

420 See e.g. Kopioisto’s (2§), Teosto’s (3§) and Gramex’s (2§) contracts for transfer of rights. They all stipulate that it is left to the society to decide to what extent the CMO’s represent their customers. Referred contracts are available in Finnish on the homepages of the mentioned societies. In fact, members of collectives should in theory ask permissions from CMOs also in order to use their own content if regarded possible despite the opposite assumption. If no permission was required for using one’s own content, a member could put his or her content openly available for everybody obscuring the purpose of having exclusive rights. For example, Teosto (a Finnish Composer’s Copyright Society) offers on certain conditions licenses to its own members for using their own music on the Internet. See (only in Finnish): <http://www.teosto.fi/teosto/websivut.nsf/7d7cb8d7c8ceffa0c22565c9004cf780/c42fe8c067eacd05c22575cc00285258!OpenDocument>. It is possible that CMO’s have different types of customer contracts and reciprocal representation agreements.

421 Another thing is that users would most likely often prefer completely free use i.e. not to ask permissions or pay compensations at all.

## 9.2. COLLECTIVE MANAGEMENT ORGANIZATIONS AND POSITION OF AUTHORS

As individual authors assign their rights to CMOs it is CMOs who conduct the administration of rights in practice. CMOs are legal persons, which often are monopolies having also other legal persons as members.<sup>422</sup> Already this indicates that CMOs as legal persons seem to fall outside fundamental rights protection aiming to protect certain essential rights (“essential foodstuffs, of essential primary health care, of basic shelter and housing ...”) of authors as natural persons. CMOs neither create, copy nor communicate any content as postulated by the individualistic copyright theory.<sup>423</sup> They neither need to have any content themselves nor necessarily even knowledge of precise whereabouts of exact pieces of content used by users.<sup>424</sup> It would also be impossible for them to take into consideration individual opinions of thousands of right holders in each licensing situation. If this was possible, individual licensing should be possible too. Leading role of CMOs may also be read from a statement of the managing director of Teosto (a Finnish Composers’ copyright society) who has described objectives of CMOs in a following manner: “Premises and objectives of CMOs are based on collective administration, which also defines its means and possibilities to act. A CMO is not an agent for individual customers, but acts on behalf of the collective it represents”.<sup>425</sup> In fact even if all the individuals in CMOs would constantly have mutual understanding regarding administration of content, the understanding would not be an opinion of an individual, but opinion of a collective. Consequently it may be described that the administration of rights by CMOs in practice creates a “collective power”, which is separate from individual administration.<sup>426</sup>

There are certain rulings that pose limitations to CMOs. In GEMA ruling Commission stated that CMOs cannot reserve rights from

422 In this respect see e.g. *Vilanka* 2010 (passim) and Olli *Vilanka*, Nordic Extended Collective Licensing – a Solution for Educational and Scientific Users and Prosumers to Copy and Make Content Available on the Internet, (hereafter *Vilanka* 2012) published in *Business Law Forum*, Vantaa 2012, p. 263 – 264. It could also be mentioned that status of right holders in CMOs may vary. Some may be members whereas some are customers of CMOs.

423 In theory they of course communicate e.g. their own homepages and other information created by their employees. They also may have archives for certain types of works, but their business is not based on mentioned types of content.

424 For example, a location of a printer or a computer hard drive (etc.) producing a certain copy is irrelevant from a right holder’s perspective. In theory even the address of a possible user is meaningless, if the user in question pays adequate compensations to the CMO.

425 See Teosto’s response “Tekijänoikeuden suuntavivoja” to the Ministry of Education and Culture’s request for comment, p.8 (authors translation), available at (in Finnish): [http://teosto.fi/teosto/websivut.nsf/0/2aab350e34f23dbc22572ea00297f5d/\\$FILE/OPM%20Tekij%C3%A4noikeuden%20suuntavivoja%20280507.pdf](http://teosto.fi/teosto/websivut.nsf/0/2aab350e34f23dbc22572ea00297f5d/$FILE/OPM%20Tekij%C3%A4noikeuden%20suuntavivoja%20280507.pdf). See similarly also *Huuskonen*, p. 193 – 194.

426 It could already at this point also be mentioned that for this reason it is difficult to draw distinction from an individual author’s perspective between collective licensing based on liability rules (i.e. to rules such as compulsory licensing entitling authors to obtain mere compensations) and exclusive collective exercise of rights: in both cases individual authors who have assigned their rights to CMOs have accepted that individual administration of rights is not possible and they may at best expect to get compensations.

authors unreasonably widely.<sup>427</sup> For example, it was not considered reasonable to demand authors to assign all their current and future rights globally. Discriminating against authors based on the duration of membership and nationality was problematic also. In so called Daft Punk-case Commission stated that regarding use of content on the Internet CMOs should allow authors administer rights individually.<sup>428</sup> The rule may be derogated on reasoned and objective grounds. Recital 9 of the proposal for Directive on Collectives<sup>429</sup> also seems to place individual administration of rights as the main rule as it pertains to relationship between individual and collective administration of rights. The proposal for Directive on Collectives in Article 6(3) also states collecting societies should provide appropriate and effective mechanisms of participation for their members as it pertains to decision making processes of collecting societies. However, despite this it has been argued that in practice role of individual authors should be rather petty.<sup>430</sup> Such arguments contradict GEMA and Draft Punk rulings, the Directive on Collectives emphasizing role of individuals and individualistic *droit d'auteur* copyright theory. If disputes arise case law should provide guidance to the question in the future.

However, not all authors assign their rights to be administered collectively. Nevertheless they may be affected by collective administration. In the Nordic countries this happens through extended collective licenses. Consequently position of these “non-affiliate” right holders shall be evaluated next.

### 9.3. COLLECTIVE ADMINISTRATION AND RIGHTS OF NON-AFFILIATE RIGHT HOLDERS

Non-affiliate authors are all authors and legal persons owning copyrighted content who have not assigned their rights to any CMO. In this respect the book has already evaluated the position of right holders in an author – prosumer relationship and legal person – prosumer-relationship. However, how should we understand rights of right holders in cases the legislator already itself suggests that individual administration

427 See GEMA I (OJ L 134/15, 20.6.1971) and GEMA II (OJ L 166/22, 24.7.1972).

428 Banghalter & Homem Christo v. SACEM (COMP/C2/32.219, 12.8.2002).

429 A proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, Brussels, 11.7.2012, COM(2012) 372 final, recital 9.

430 For example, according to Kivistö possibilities of authors to “tailor” what rights are assigned to CMOs in practice are rather narrow. See Martti Kivistö, Tekijän ja järjestön välinen perussuhde tekijänoikeuksien kollektiivhallinnossa, published in Lakimies 7 – 8/2013, p. 1254.

of rights is not possible by enacting a collective license, but an individual author does not assign his/her rights to a collective?

As explained, enacting a legal tool for collective administration of rights on the grounds that individual administration is not possible already questions rationality of having individual rights in the first place. In fact, precisely for this reason the analysis in this book earlier suggested that use should be exempted from copyright in cases when concluding individual transactions is not possible. Thus, according to this view, legislators should not secure essential economic rights of authors by granting exclusive rights to them if administering those exclusive rights is considered impossible.

This has also been the solution in some of the cases when Nordic collective licenses have been enacted as there are two types of Nordic collective licenses, namely a compulsory and a contractual license. The main difference between the compulsory and the contractual license is that the compulsory license allows use against compensation (i.e. forms a liability rule), whereas the contractual license retains an element of exclusivity as it necessitates permission from a CMO prior to use. This means that through a compulsory license the legislator has superseded exclusive rights.<sup>431</sup>

However, also a contractual license may extend its effects to non-affiliate right holders. If this is the case a contractual license is referred to as an extended contractual license as it extends its effects to non-affiliates. The extension exists because never all the right holders assign their rights to a CMO from their particular field of art or science.<sup>432</sup> In other words, if collective licenses do not have the extended effect the result would be that due to masses of information especially users interested in using large quantities of content would be unable to obtain a license from a CMO with sufficient coverage as it would not be possible for the user to sort out from the information mass content of those authors who have not assigned their rights to the CMO in question. Consequently, without an extended effect users would inevitably end up violating rights of non-affiliates or, alternatively, should refrain from using content at all in order not to violate rights of those who have not assigned their rights to the CMO in question. Neither of the options is desirable as the first would endanger rights of non-affiliates and the second rights of affiliates and users.<sup>433</sup>

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431 In practice CMOs administer use of content although a compulsory license is used. A user still needs to agree on the level of compensation with a CMO administering use as described by a certain paragraph for a compulsory license as it would not be possible to agree on the price of use individually with each right holder.

432 There may be many reasons not to assign rights to a CMO (in theory every non-affiliate may have a reason of his/her own). According to Ficsor "the repertoire of works in respect to which a CMO has been *explicitly* given the power to manage exclusive rights, in fact, is never truly an entire world repertoire (because, in certain countries, there are no appropriate partner organizations to conclude reciprocal representation agreements, or because certain authors do not trust and CMO with the exercise of their rights). Ficsor II, p. 60–61. See also *Gervais* 2010, p. 4.

433 Rights of affiliates would be endangered because they could not obtain compensations through licensing as the user could not buy the license. It could be mentioned that in Denmark it seems that a user has an option to decide whether it wants a contractual license with the extended effect or not. See Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, published in *Collective Management of Copyright and Related Rights*, Second Edition, edited by Daniel Gervais. Kluwer Law International 2010, p. 302 – 303.

Thus, this dilemma has been solved by extending the effect of collective licenses to non-affiliate right holders in certain occasions through paragraphs extending the effect of contractual licenses.

The extension limits *de jure* rights of non-affiliates emphasizing the paradox of applying individualistic copyright theory based on exclusive rights if rights are de facto administered collectively. In order to alleviate effects of this limitation to rights of non-affiliates certain additional rights have been granted to non-affiliate right holders. Consequently, it needs to be evaluated whether these rights are capable of protecting fundamental rights of non-affiliates.

### 9.3.1. A NON-AFFILIATE AND A SEPARATE RIGHT TO COMPENSATION

A *separate right to compensation* is the first attempt to secure position of non-affiliates in an extended collective licensing system. It means that a non-affiliate has a right to ask compensations for use of his/her content from a CMO, which collected the compensations from a user. The right exists regardless of whether a compulsory license or an extended contractual license has been enacted.

However, despite the right to compensation it is difficult to see that the position of a non-affiliate could be as strong as a member's position. For example, non-affiliates do not receive any information whether their content has been used or not. A non-affiliate's right to collect compensation also expires unless it is used during a certain time period. For example, in Finland and Sweden the right expires unless a demand for compensation is made within three years counted from the end of the year when the use took place. One should also be able to demonstrate that the use took place. Although CMOs occasionally have itemized reporting systems regarding certain forms of use (e.g. for radio and television broadcasts), in other occasions information regarding used content is based on studies applying sampling as a method. Thus, it is clear that no one can provide evidence of all of the possible events where a certain piece of content may have been used, but non-affiliates may at best have haphazard information regarding the use of their content. If the burden of proof that the use took place between CMOs and non-affiliates is placed on a non-affiliate, it is clear that their possibility to claim compensation is often non-existent. Therefore, it is not surprising that the right to claim compensation is rather rarely used and especially for foreign non-affiliates often remains as a theoretical possibility. For example, according to *Koskinen-Olsson* in 2004 Teosto (a Finnish Composers' Society) represented thorough reciprocal representation agreements the total of 48.198 right holders and 6.275 (i.e. approximately 13%) of them were non-represented (i.e. non-affiliates). Despite this Teosto allocated only 3, 1% of the

revenues to non-affiliates.<sup>434</sup> In addition, according to my own interviews, clearly less is often paid to non-affiliates.<sup>435</sup>

This indicates that a non-affiliate's right to compensation is a rather theoretical right. It protects non-affiliates as a fundamental right only if it secures their essential interests. There is no evidence suggesting that this would be the case.<sup>436</sup> Consequently, it is difficult to see that the separate right to compensation could function as a securer of fundamental rights protection for non-affiliate authors although it in certain cases might in theory end up securing essential interests of individual non-affiliates. In practice, CMOs often end up keeping the collected compensations of non-affiliate authors as they only rarely seem to be collected.

### 9.3.2. A NON-AFFILIATE AND A SEPARATE RIGHT TO OPT OUT

*A right to opt out from the license* (or “ban the use”) in the extended contractual licensing system is the second separate right granted to non-affiliates. It grants a non-affiliate the right to opt out from the license granted by a CMO, if specifically stated in a paragraph providing a contractual license.<sup>437</sup>

From the viewpoint of fundamental rights, the role of the right to opt out is curious as it is difficult to see that the right to opt-out would have much relevance when evaluated as a tool protecting essential economical interests of authors. This is because an exclusive right is granted to authors in order to secure their essential economical interests through individual transactions. Now, a right to opt from a license already itself implies that concluding a transaction in order to secure basic economic interests of the author is *not* on the mind of an author as s/he is on the contrary opting out from a license. It may be argued that the author possibly wants to opt out from the collective license in order to conclude a direct transaction with better terms with the user in question. However, such an argument is close to theory as justification for collective licensing is impossibility of individual licensing. It is also

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<sup>434</sup> Koskinen–Olsson, p. 297.

<sup>435</sup> According to my interviews two CMOs (Teosto and Kopiosto) in Finland both distributed approximately 10.000 (ten thousand) euros annually to non-affiliates, which is insignificant amount in comparison to collected compensations (approximately 40 – 45 million annually by the referred CMOs). See in more detail Vilanka, Chapter 4. However, see also next footnote.

<sup>436</sup> For example, there has been one publicly discussed case in Finland in which a large group of well known British artists (according to some sources such as Elton John and Paul McCartney) had organized themselves under an agency (Rights Agency Ltd/RAL) and claimed compensations from Gramex (a CMO in Finland for performing artists and phonogram producers) as non-affiliates. It is possible that if these types of cases increase, amounts of paid compensations to non-affiliates may end up being higher especially in comparison to cases where individual authors as “average Joes” attempt to collect them. However, it is difficult to see that such cases would protect essential interests of recipient authors if their essential economic interests are already secured as if often case regarding well known authors. The RAL v. Gramex case was settled before it went to court and consequently no public information regarding distributed compensations exists.

<sup>437</sup> It should be mentioned that a compulsory licenses do not acknowledge a separate possibility to opt out/ban the use for a non-affiliate as such a right would undo the purpose of the compulsory license, which allows use against compensation. Or alternatively opting out would mean that a right holder decides not to collect any compensations at all.



difficult to see that an individual author as a natural person could be in a position to negotiate better terms of use in order to secure his/her essential interests than a CMO, which in Europe are monopolies in their respective fields of art or science.

There are also other severe challenges related to applicability of the right to opt out. Firstly, already existence of the separate right to opt out/ban the use demonstrates that a right holder has lost his/her possibility to control the use of his/her content – the new right to ban the use is granted as an attempt to give exclusivity back to him/her. Secondly, the right does not exist for all usage forms, i.e., one cannot always use it even if s/he wanted to. Thirdly, the right is also logically problematic because if it was possible to pose individual bans for each usage situation, it should also be possible to grant individual licenses. As the reasoning for collective licensing is that individual licensing is impossible, it is difficult to see that posting individual bans for separate usage situations could be possible either (or from the user's perspective go through all set bans).<sup>438</sup> Consequently, it is not surprising that attempts to ban the use are very rarely used. For example, during years 1980 – 1990 in Finland the ban was attempted to apply *approximately 10 times* related to use of music in radio and television broadcasts.<sup>439</sup> These examples illustrate the theoretical nature of exclusive rights as rights for an individual author.

At this point it could be mentioned that formal/casuistic reading of the law often suggests that compulsory licenses limit rights of authors more than contractual licenses as a compulsory license allows use of content against compensation in general whereas in a contractual licensing system a CMO has an exclusive right to decide about licensing. However, the role of individuality is insignificant regardless of the collective licensing model used: neither of the models can guarantee possibilities for individuals to administer the use of content in practice – such an argument would already contradict the justification of collective management which is impossibility of individual administration – or even guarantee specific distribution of compensations. This questions whether it is meaningful to make separation between compulsory and contractual licenses from an individual's perspective.

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<sup>438</sup> In fact it could be reminded that a non-affiliate right holder retains a possibility to license individually. However, it is likely that no wide scale direct individual licensing takes place when collective licenses have been enacted as the reasoning for collective licensing is impossibility of individual licensing. Earlier analysis in this book also suggests that individual authors are not interested in direct individual licensing with prosumers.

<sup>439</sup> See Committee Report 1990:31, p. 72. Despite these logical and practical problems, there may be attempts to create “ban lists” for certain usage forms. However, even if one creates such lists, it is difficult to see how the lists could be respected as masses of content grow constantly. How could any user/prosumer constantly (possibly globally) go through all the “ban lists” before producing or communicating each piece of content? It is impossible to even obtain accurate information whose content has been used in mass use situations. See also *Ficsor*, p. 45 - 47. Furthermore, even if one could store all the information that is being communicated in the information society, it is questionable if anyone could constantly go through the growing and evolving information mass in order to analyse whether the bans were respected. See also *Vilanka*, Chapter 4.

Despite this Mihály Ficsor has argued that mandatory collective management (resulting to mere rights to remuneration) imposes similar (limiting) conditions for a right holder as enacting a compulsory license would impose. He sees that in mandatory management situations right owners would be in a position to act only “in a certain way”, exploit their rights only “in a certain manner” and could exercise their rights only “through a certain system”.<sup>440</sup> Later, he also explains that a lack of a possibility to opt out (ban the use) would make a blanket license system “doubtful”.<sup>441</sup> However, it is difficult to understand what the practical relevance or meaning behind the quotations is from an individual’s perspective regardless of which of the collective licenses have been implemented: An assumption is that individual administration is impossible no matter which one is enacted. Moreover, in both models, an individual can at best expect to obtain compensations. Furthermore, as explained, the right to “opt out”, is merely a theoretical attempt to protect exclusive rights of individuals. Ficsor has also argued that it would be illogical to demand (a non sequitur argument) that “if a right cannot be exercised in a way in which it has been traditionally exercised, it should be eliminated or considerably restricted.”<sup>442</sup> However, as in collective licensing systems an individual may at best obtain compensations, it is difficult to see how any argument favoring a right compensation could be illogical. *Instead it is difficult to regard logical to invoke rights based on individualistic copyright theory if one accepts when assigns his/her rights to a collective that individual administration is impossible.* Therefore, one could argue that it is difficult to see that maintaining rights derived from impossible premises (“an individual author controlling the use of his/her works”) is rational.<sup>443</sup> Furthermore, considering that all the legal systems create rights *and obligations*, it is curious that Dr. Ficsor, who seems to favor exclusive based extended collective management system (with a possibility to compensation and opt out for a non-affiliate) in comparison to compulsory licensing, does not explain any problematic features such system might contain from the viewpoint of the individualistic copyright theory. A system where CMOs in practice hold all the relevant cards – including an exclusive right to refuse from licensing – may indeed contain certain problematic features from the

440 Ficsor II, p. 42 – 44.

441 Ficsor II, p. 61 – 62.

442 Ficsor, p. 17.

443 See also Juha Pöyhönen (nowadays Karhu), Sopimusoikeuden järjestelmä ja sopimusten sovittelu, Suomalaisen Lakimiesyhdistyksen julkaisuja A-sarja N:o 179, Vammala 1988, p. 4, where Pöyhönen states that “However it is not rational to maintain an idea that there are rights which are impossible to fulfil.” (author’s translation).

viewpoint of individual members. For example, as CMOs in practice reserve all the relevant rights in the assignment contracts, individual members in principle need permissions from CMOs also in order to use their own material. Furthermore, if a CMO for some reason refuses to grant a license to a user, *members of CMOs do not get compensation at all*. As a compulsory license secures compensations for individual authors (and enables use) it is difficult to see that from an individual author's perspective a compulsory license would be more limiting than a contractual license. One might attempt to argue that the exclusive right contained in the contractual license is indirectly more beneficial for individual authors as the contractual licensing system grants CMOs, in words of the legislator, "very extensive authority" leading to possibility that users may not be able to operate at all as "...high compensation level combined to a strong negotiation position may in practice prevent the use of works."<sup>444</sup> This could be understood so that the exclusive element might give stronger leverage for CMOs to negotiate on the price with users. In other words, one could argue that the benefit a contractual license in comparison to a compulsory license provides for an individual author is an increased level of compensations. However, although the risk may be smaller, it is possible that a user and a CMO end up to a non-contractual situation also if a compulsory license is being applied e.g. due to disagreement on price. Therefore, as CMOs in the Nordic countries (and Europe) already are monopolies in their respective fields of art/science, it is unlikely that the variation in the level of collected compensations could be too significant from an individual author's perspective regardless of the used license model.<sup>445</sup>

444 Tekijänoikeustoimikunnan V mietintö Äänitteiden, ja audiovisuaalisten teosten kopiointi ja levitys (Committee Report 1990:31), p. 67. A society may also attempt threat to withdraw a license. See e.g. case of the Swedish Market Court 1996:23 and Agne Lindberg – Daniel Westman, Praktiskt IT-rätt, andra upplagan, Stockholm 2000, p. 234 describing a case rejecting a possibility to withdraw from a licence. For a user the situation is especially problematic if the user is dependent on the used right. A risk for refusal increases if several content types are used. In such situation a user is unable to use if even one CMO from certain field of art declines from licensing.

445 At the moment Finnish competition authorities all the major collecting societies in Finland have a dominant (in practice monopolistic) position as defined in the Act on competition restrictions 12.8.2011/948 (formerly 480/1992). See cases of Competition Council of Finland dno:5/359/95 (concerning Teosto, p. 32 ff.) and dno:3/359/95 (concerning Gramex, p. 27 ff.). Both decisions were given in 5.10.1995. Kopiosto's dominant position has been defined in a case of the Competition Office between Kopiosto and Confederation of Finnish Industries in 6.11.100 (Dnro 752/61/99). See also the letter of the Competition Office discussing Kopiosto's position (given in 31.1.1994, dno: 595/61/93), which defines it a legal person carrying on a business. See also The Court of Justice of the European Communities, case *Ministère Public v. Tournier and Lucazeau v. Sacem* (combined sessions 110/88, 241/88 and 242/88, section 33). The monopolistic situation may partly change in the future as the Commission has e.g. found that reciprocal agreements between collecting societies licensing author's public performance rights in Europe restrict competition. See, Commission decision of 16.07.2008 C2008 3435final, relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C2/38.698 – CISAC). See also Commission of the European Communities, Brussels, 30.9.2005, Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services. However, it remains to be seen whether the decision leads to any increase in competition. Collecting societies have also appealed against the decision of the Commission to the Court of First instance. See e.g. Martti Kivistö, A Push Towards Competition, Complaints of Societies are Pending before the Court of First Instance, IPRinfo Magazine, 2/2009, p. 24 – 25.

For the aforementioned reasons it is difficult to agree with Dr. Ficsor as it pertains to relationship between contractual and compulsory license from an individual authors perspective.

Finally, it should be asked if collective administration should be made mandatory as has also been suggested. This would be consistent with the notion that role of individual authors is insignificant as it pertains to collective licensing of content.

## 9.4. RIGHTS OF AUTHORS AND MANDATORY COLLECTIVE LICENSING?

Arguments supporting mandatory membership in collective management organizations may be found.<sup>446</sup> This means that the law would directly stipulate certain forms of use either under compulsory licensing<sup>447</sup> or under exclusive collective exercise of rights.<sup>448</sup> Arguments to this direction are coherent with an assumption that individual administration of rights is not possible. In fact, in Finland the law may even be read in manner indicating that collective administration through contractual licensing is not anymore an exception to a rule.<sup>449</sup>

*Helfer* has evaluated possible mandatory obligation to join a CMO from a viewpoint of freedom of association. He compares the situation to possible compulsory memberships in labor unions and concludes that compulsory memberships in CMOs could be considered in developing countries at least until economic and cultural conditions in them are improved.<sup>450</sup>

However, even if in the light of employment law, mandatory collective administration could occasionally be considered to be a plausible solution, the situation becomes challenging in principle when we evaluate possible mandatory memberships from the viewpoint of individualistic *droit d'auteur* copyright theory.

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446 See e.g. Michály *Ficsor*, Collective Management of Copyright and Related Rights at a Triple Crossroads: Should it Remain Voluntary or May It Be “Extended” or Made Mandatory, Copyright Bulletin, October 2003, p. 3 – 8.

447 See e.g. Articles 11bis(2) and 13 of the Berne Convention for the Protection of Literary and Artistic Works, of September 9 1886 with later amendments.

448 See e.g. Articles 3 and 9.2. of the The Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (hereinafter the Satellite and Cable Directive).

449 Since the implementation of the copyright directive new heading of the Chapter 2 of the Finnish Copyright Act has stated the following: “Restrictions to Copyright *and* the Rules Governing Contractual License” (emphasis added). This would indicate that a contractual license is not a restriction anymore. According to Government Bill 28/2004, the intention was to “emphasize the nature of contractual licenses as a means for the collective administration of rights”. Government Bill 28/2004, p. 81. Hence, the new heading of Chapter 2 of the FCA and the wording in the preliminary material allows the interpretation that contractual licensing is no longer a limitation. It should be mentioned that the Constitutional Law Committee has referred to its own memorandum evaluating collective labour agreements and stated that extended collective licensing poses also limitations in relation to rights of authors. However, as it pertains to collective labour agreements they limit rights of employers whereas collective licenses for copyright rights of authors (“employees”). This questions whether the Constitutional Law Committee has understood the nature of collective licensing. See also Olli *Vilanka*, Rough Justice or Zero Tolerance? – Reassessing the Nature of Copyright in Light of Collective Licensing (Part I), published in In Search of New IP Regimes, Helsinki 2010, p. 145 ff and 156 ff.

450 *Helfer*, p. 93 ff.

This is because it may be asked whether it is rational to speak of fundamental rights protection based on individual copyright theory at all, if collective management systems (similar to those that were historically favored in totalitarian countries) are being made mandatory.<sup>451</sup> For example, it could be asked if the traditional concept of property (based on Locke's views on individual ownership) would change, if there was a mandatory obligation to administer "property of an individual" through a collective? Would there be, instead of a fundamental right, a "fundamental obligation" for authors to assign their rights to legal persons such as CMOs - and finance them at the same time? Would there be some consequences for individual authors if they refused to assign their rights to a CMO or refused comply with their rules by, e.g., concluding direct transactions with users (to the extent it is possible)? For example, would authors acting in such manner "steal from the collective" or from themselves?

Consequently, although collective administration systems may in practice occasionally provide functional solutions, making collective administration systems mandatory for authors would in many ways be problematic from the viewpoint of individualistic copyright theory. In fact, provided such a decision is made it may be asked whether collectives would "own" expressions to the extent stipulated in law. Such situation would resemble the theoretical outcome described earlier in chapter 9.1.1. Mandatory membership also effectively nullifies relevance of freedom of contract of authors as they could not have freedom to decide whether they want to assign their rights to a collective or not. Through mandatory collective administration we would formally move to a collective administration system where the rights of authors would become a rhetorical statement. Of course, to a large extent this may already today be the case as it pertains to collective administration of rights. This only highlights how difficult it is to extend fundamental rights protection to collecting societies, especially in the light of individualistic *droit d'auteur* copyright theory. Consequently it shall next be asked how we should then evaluate collective administration of rights in the light of fundamental rights.

## 9.5. COLLECTIVE MANAGEMENT AND FUNDAMENTAL RIGHTS

CMOs in Nordic countries often are formally ideological associations. Therefore, CMOs may in theory have specific types of values and objectives stated in their

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451 As explained Martin Kretschmer (who does not specifically examine Scandinavian collective licenses but collective administration in general) states that: "the collective administration of [...] copyrights does not straightforwardly reflect a single underlying concept of private property – perhaps not even a notion of copyright as property." See Martin Kretschmer, *The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments*, E.I.P.R Issue 3, Sweet & Maxwell Limited 2002, p. 132 – 135. See also Kivimäki who stated that adopting collective licensing systems would lead to the crisis of the individualistic copyright system. See Kivimäki, p. 66 and especially footnote 4.

articles of association in comparison to other legal persons such as limited liability companies, which primary interest is to pursue for profit. However, as the book evaluates collective administration from the viewpoint of fundamental rights, the following shall not evaluate articles of association as enacted by different CMOs. Instead, it evaluates to what extent it seems plausible that CMOs attempt to follow values and objectives as provided by fundamental rights and especially Article 27.2 of the UDHR and Article 15(c) of the ICESCR protecting rights of authors. This is because it would be difficult to see that an objective of a CMO would in the first instance correspond with a certain fundamental rights unless the CMO also *de facto* honors the protected value or objective behind that fundamental rights.<sup>452</sup> In other words all ideological associations (also those promoting e.g. certain breeds of cats or dogs or motorcycling) may state having certain values and objectives, but they are relevant from the viewpoint of fundamental rights only if they correspond with the values and objectives embedded in fundamental rights and the association in question also *de facto* honors them.

As it pertains to Article 27.2 of the UDHR and Article 15(c) of the ICESCR, a fundamental right connection would in the first instance mean that a CMO's primary aim should be distributing collected compensations to those ("ailing") authors whose essential economic interests are endangered. This means, *inter alia*, that if essential economic interests of those authors who receive compensations have already been secured (as often is the case regarding transnational corporations or international rock/pop stars) it is difficult to see that the distributed compensations secure fundamental rights. Thus from this point of view, one may connect fundamental rights protection to CMOs provided CMOs *de facto* follow the aim of securing rights of those authors who are in most need. It could also be specified that it would be difficult to talk of a system with a principal aim to secure fundamental rights, if it only occasionally happened to fulfill essential economic interests of authors. If such an argument was accepted, we could argue that all legal persons have a fundamental right connection as they may (and most probably often do) secure essential economic interests of people working for them. Thus, in order to enjoy fundamental rights protection primary aim of CMOs should be securing economic interests of authors whose essential economic interests ("essential foodstuffs, of essential primary health care, of basic shelter and housing...") are endangered. CMOs should also *de facto* act accordingly.

However, it is difficult to find any evidence that CMOs would in the first instance follow the aim of fundamental rights by distributing compensations in a transparent manner to those authors who are in most need.<sup>453</sup> No paragraph in the

452 If they are not honoured accordingly, any stipulations for objectives would be mere rhetorical statements hangin in the air.

453 In order to do so CMOs should in fact have sufficient information about economic situation of recipients in a similar manner as unemployment funds have.

Finnish Copyright Act (and to the authors knowledge in any other copyright act) obliges CMOs to do so. In fact, often compensations are paid to legal persons.<sup>454</sup> Compensations are also distributed to foreign countries. Provided they do not end up to (“ailing”) authors in need but e.g. according to popularity (e.g. to rock and pop stars and large publishing houses) adding fundamental rights extension to the picture becomes difficult.<sup>455</sup> Moreover, in Finland no public completely transparent information is available as it pertains to who eventually gets the compensations distributed by CMOs.<sup>456</sup> Only rough estimations may be given.

*Kretschmer* has generally described the role of collective management in the following way: “Organisations are self-organising actors that develop their own dynamic. If an organisation is to act in the conflicting interests of third parties, complex principal agent problems arise. For collecting societies, there has been a tendency towards empire-building and inefficient bureaucracy. The cost of collection in many areas of usage amount to a quarter of revenues distributed -while for other complex services (such as health insurance) administrative deductions of five per cent are seen as high. Governance structures are often less than transparent. Notorious is § 14 of GEMA’s terms of association according to which the “board” may consist of only one person (under this clause, Vorstand Erich Schulze ruled GEMA from 1947-95 when he awarded himself an annual pension of DM 546,000). Another doubtful practice must be hereditary succession (French society SACEM has been controlled by the Tournier dynasty for most of the twentieth century).”<sup>457</sup> Although the citation has been presented in a critical context (some CMOs are more efficient than others), the citation

454 For example, a Finnish collective management organisation Kopiosto has only few direct members as natural persons although through its member organisations it has approximately 50.000 proxies. In practice it distributes majority of the compensations to its member organisations. An interview between Jukka-Pekka Timonen (executive vice president of Kopiosto) and Olli Vilanka 5<sup>th</sup> of October 2009

455 It could be mentioned that in 2010 out of 43,1 million euros collected by Teosto, 21,7 was paid to foreign authors and music publishers (i.e. 21,4 million stayed in Finland). See Annual Report of Teosto 2010 , p. 12. A distribution system favouring those authors whose “basic material interests” are threatened would most probably create tension between those whose content has been used. However, in order to even argue that the distribution system functions in order to fulfil requirements set by fundamental rights this should be the case. Legal persons should be excluded from the analysis altogether.

456 However, it could be mentioned that a requirement for transparency has been stated e.g. in General Comment 17, paragraph 48.

457 See Martin *Kretschmer*, *The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments*, E.I.P.R. Issue 3, Sweet & Maxwell Limited (2002), available at: [http://www.cippm.org.uk/pdfs/kretschmer\\_eipr\\_032002.pdf](http://www.cippm.org.uk/pdfs/kretschmer_eipr_032002.pdf). It should again be noted that Kretschmer does not specifically analyse Nordic extended collective licensing. Despite this his analysis may be used in order to describe in general problems that may be connected to collective administration as collective administration is may always be separated from individual administration and consequently in all collective administration systems principal – agent problems are present. Moreover, no legislation stipulates in detail how CMOs should distribute compensations in the Nordic countries leaving the question who eventually gets the compensations open.



summarizes the relevant: one cannot assume that compensations are distributed (with “zero tolerance”) to those individual authors whose content has been used or to those whose essential economic interests have been endangered.<sup>458</sup>

It could also be mentioned that it is difficult to connect collective administration to concept of individual property ownership either. This is firstly because expenses of CMOs are deducted from the collected compensations before they are distributed to possible individual members.<sup>459</sup> Thus already for this reason compensations cannot be rigorously distributed to those individuals whose content has been used making it also unconvincing for CMOs to demand “zero tolerance” respect for individualistic *droit d’auteur* copyright theory. Furthermore, one may often only roughly evaluate whose content has been used.<sup>460</sup> Occasionally, it is not even intended that collected compensations are distributed to adequate individuals as they are used for “common cultural and social purposes”.<sup>461</sup>

These notions imply that the work in CMOs does not seem to be genuinely fundamental rights driven (i.e. in theory work close to a volunteer work/work with minimum wage for “ailing” authors). Consequently it is difficult to see that CMOs could enjoy fundamental rights protection as provided by Article 27.2 of the UDHR

458 It could also be mentioned that as it comes e.g. to Teosto (Composers’ collective society in Finland) according to Hietanen in 2004 “...only 190 Finnish song writers out of 16,110 received more than 20,000 € in annual royalties and half of the members did not get any.” Herkko Hietanen, *The Pursuit of Efficient Copyright Licensing, How Some Rights Reserved Attempts to Solve the Problems of All Rights Reserved*, a thesis for a degree of Doctor of Economics and Business Administration, Acta Universitatis Lappeenrantaensis 325, Digipaino 2008, p. 243, footnote 126. Respectively it could be mentioned that in 2007 Teosto had approximately 19,000 customers and 208 of them received more than 20,000 euros a year in annual royalties. Still in 2007, half of the members did not receive any royalties. Annual Report of Teosto 2007, p. 1 and 12. Provided these approximately 200 persons who receive the largest amounts of compensations are already wealthy, if not even the wealthiest, it would be especially difficult to extend fundamental rights protection to collective administration of rights. As there are no completely transparent distribution systems, it is difficult to know who eventually obtains the compensations. There is either no information whether the small portion receiving the most amounts are legal or natural persons.

459 Also history connecting collective standpoints to totalitarianistic countries makes it difficult to connect Lockean individual property as a fundamental right to collective administration.

460 Regarding the problem related to pinpointing adequate right holders WIPO has stated the following: “The ideal solution would be to obtain all the data concerning all performances of all works and to distribute the royalties accordingly. This is, however, impossible, or, at least, not feasible. ... As a consequence, an element of “rough justice”, more or less, but necessarily, appears in the distribution system.” See WIPO’s Introduction to Collective Management of Copyright and Related Rights, Document prepared by the International Bureau of WIPO. The citation is extracted from sections 53 and 54 of the document.

461 As Ficsor, referring to deductions made for common cultural purposes, puts it: “freedom of right owners who might not agree with such deductions is fairly restricted (and one may only hardly allege that all rights owners are equally altruistic and influenced by the idea of what is called the principle of solidarity between authors, performers, etc.).” Mihály Ficsor, *Collective Management of Copyright and Related Rights*, WIPO Publication No. 855 (E) (hereafter Ficsor), p. 150. It should also be mentioned that according to some criticism administration of rights in CMOs is not democratic. For example, Erkki Puumalainen, manager of a recording company called “Poptori”, has often publicly criticized CMOs, among other things, for lack of democracy. See e.g. Erkki Puumalainen’s respons to Otto Donner, who has been a representative of Teosto. Available at (in Finnish): <http://www.google.fi/url?sa=t&rect=j&q=&esrc=s&source=web&cd=2&cad=rja&ved=0CE0QFjAB&url=http%3A%2F%2Fwww.poptori.fi%2Fpress%2Ftaman%2520paivan%2520iltalehdessa.rtf&ei=OestUJGyBO754QTci4GAAQ&usq=AFQjCNEiM9JWng5T5Sx7iw7asld9Tab6Q>. See also Erkki Puumalainen, *Kukaan ei ole turvassa tekijänoikeusjärjestöjen monopolilta* (in English: No-one is safe from the monopoly of CMOs), available at (in Finnish): <http://piraattiliitto.org/artikkelit/2008/12/poptorin-toimitusjohtaja-kukaan-ei-ole-turvassa-tekij%C3%A4noikeusj%C3%A4rjest%C3%B6jen-monopoli>.



and Article 15(c) of the ICESCR. Thus it may be asked what we could assume that are the principal values and objectives of CMOs.

This may also be seen from the viewpoint of other fundamental rights. Formal reading of the law identifies “collective power” with protectionism of individual (“ailing”) authors enabling CMOs to claim that e.g. already a 0,07 euro theoretical damage may be considered as a crime in a manner that prevents use of expressions in open environment as provided by Article 27(1) of the UDHR and Article 15(1)(a) of the ICESCR.<sup>462</sup> As in Finland the maximum sentence is two years imprisonment, formal reading of the law also implies that CMOs do not need to care about a prosumers right to privacy as provided in Article 12 of the UDHR or right to life, liberty and security of person as provided by Article 3 of the UDHR either. It is also difficult to find arguments presented by representatives of a CMO aiming to secure these fundamental rights of prosumers. Therefore, also this indicates that they do not have an objective to honor fundamental rights. Instead seems plausible to suggest that CMOs have the same primary objective as their possible corporate affiliates have an aim to maximize profits.<sup>463</sup> The fact that CMOs demand respecting exclusive rights of authors under the pain of criminal sanctions, but are at the same content with living on the assets of individual authors regardless of whether they are affiliates or non-affiliates and do not work with minimum wage, are perhaps the clearest indication of the aim of CMOs to maximize profits.<sup>464</sup>

## 9.6. CONCLUSION

### 9.6.1. COMPARING COLLECTIVE ADMINISTRATION AND RIGHTS OF PROSUMERS

The above analysis illustrated that role of authors is petty as it pertains to administration of content collectively. It was also difficult to see that the compensations were distributed as the aim of fundamental rights protection postulates, i.e., in the first instance to those authors in need. From the viewpoint of fundamental rights

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<sup>462</sup> Referred 0,07 euros is a license fee a Finnish collecting society Teosto offers for posting a composition openly available on the Internet for uploading. See Teostos www-pages at [http://www.teosto.fi/sites/default/files/files/P13\\_Download%202013.pdf](http://www.teosto.fi/sites/default/files/files/P13_Download%202013.pdf).

<sup>463</sup> Superseding profit maximization with other values would be in conflict with the objective of possible corporate affiliates CMOs may have. In fact this would also be problematic from the viewpoint of those individual authors who consider collective management organisations as tools to maximize profits. It would be naive to postulate that no such authors exist. It is possible that CMOs do not in practice attempt to interfere each possible copyright violation. However, despite this they do not actively advocate e.g. securing rights of prosumers as provided by Articles 3, 12 or 27.1 of the UDHR. On the contrary it seems that they are content with the current situation and doctrine emphasising formal reading of the law. They may even demand respecting copyright with “zero tolerance”. See e.g. Vilanka 2010, p. 133. This implies that fundamental rights doctrines are not primarily of interest of CMOs. Claims that primary objective of CMOs in general would be to embrace fundamental rights would be problematic because it would mean that they should take into consideration also rights of users. It is difficult to find evidence indicating that CMOs as interest groups had ever been keen to embrace rights of users. In other words it is the legislator who should take into consideration fundamental rights drawing to different directions.

<sup>464</sup> CMOs have collected compensations of non-affiliates in Nordic countries all the way from the 1960s. As explained, only rarely non-affiliate authors collect them from CMOs.

analysis, rather curiously, there are either no specific stipulations in the international treaties or EU-directives obligating to distribute compensations in order to achieve this objective. It was also difficult to see that collected compensations could be distributed rigorously to those authors whose property had been used.<sup>465</sup> It would also be challenging to see that indirect protection especially aimed to protect small businesses could be applied in cases of CMOs, which are in a monopolistic position and may also have large corporate affiliates. One could attempt to argue that CMOs administering rights collectively secure essential economical interests of authors as second generation collective right. However, a problem of this type of argument is that there is no openly available objective information regarding who receives distributed compensations. In other words, as long there is no information that the compensations are used to secure essential interests of authors, it is difficult to see that collective administration mechanisms could earn fundamental rights protection. Even if the compensations were occasionally distributed to those individual authors whose essential economical interests are endangered, it might be questioned whether it would be justified to extend fundamental rights protection to collective administration. This is because in such case it could be argued that any legal person or compensation system occasionally securing essential interests of natural persons would earn fundamental rights protection. Therefore, keeping these premises in mind, it would be questionable if collective standpoints similar to those used by totalitarian regimes such as Nazis and old Soviet Union could obtain fundamental rights protection as enshrined in Universal Declaration of Human rights or comparable to property right based on Locke's ideas on individual ownership. This does not mean that collective power would follow ideologies as advocated by the referred totalitarian states. Instead, it may be assumed that their main interest in practice follows the very same as contemporary corporations (which may be members of CMOs) have, i.e., pursue for profit and power.<sup>466</sup> The criticism does neither mean that CMOs could not participate in human right work, e.g by giving donations, sharing compensations in the first instance to those authors who are in need and by respecting rights of prosumers. Instead it means that it is difficult to see that their primary purpose and actual actions aim to do so. States neither have an obligation to secure interests of collectives, but individual authors and prosumers.

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<sup>465</sup> Considering these notions it is not convincing from representatives of CMOs to demand respecting copyright especially as an author's right with "zero tolerance". It would also be difficult to invoke freedom of contract as the sole basis for collective administration of rights. Making such a claim would mean that CMOs should also accept that users are also free to decide whether they conclude a contract with a CMO or not.

<sup>466</sup> It should be mentioned that CMOs are in economic sense rather small actors in comparison to transnational corporations owning copyrighted content. However, as they already by definition administer rights collectively, which is by definition opposite to individual administration, CMOs and collective administration of rights highlights the theoretical problem related to the relationship of fundamental rights and corporate power.

Consequently, it is difficult to see that rights of prosumers could be endangered by collective exercise of rights. Another thing is relationships between CMOs and other legal persons who are more unlikely to pose a threat to each other on a fundamental right level. Therefore, as fundamental rights should protect natural persons it is again understood in this book, that fundamental rights analysis should break formal/casuistic reading of law, which equalizes collective administration through legal persons to individual authors whose essential needs should be secured.<sup>467</sup> This again that other means but exclusive rights should be used in order to secure rights of prosumers and authors when rights are being administered collectively.

As it pertains to position of individual authors in CMOs, it may be argued that following individualistic copyright theory suggests individual authors should have equal possibilities to participate decision making in CMOs. Moreover, individualistic copyright theory postulates that individual authors should be protected and in fact even favored in relation to possible corporate members as it pertains to distribution of compensations by CMOs. However, there are signs indicating the development is leading even further from the aim of securing different fundamental rights as shall next be illustrated.

## 9.6.2. SPECIFIC CONCERN – COLLECTIVE POWER UNLIMITED?

Formal/casuistic reading of the copyright law does not distinguish administration of content between individual authors and CMOs (or large corporations) administering exclusive rights collectively. However, as explained, it would be questionable, if collective power could endanger not only the right to science and culture but also the right to privacy and right to life, liberty and security of prosumers. Despite this even General Comment No. 17 of the Committee on Economic, Social and Cultural Rights states the following:

“States parties are obliged to prevent third parties from infringing the material interests of authors resulting from their productions. To that effect, *States parties must prevent* the unauthorised use of scientific, literary and artistic productions that are easily accessible or reproducible through modern communication and reproduction technologies, e.g. *by establishing systems of collective administration*

<sup>467</sup> It should be mentioned that if one demanded respecting freedom of contract as the protected core right (instead of protectionism for essential economic rights of authors) one should also accept that a prosumer has a right to decide whether or not to conclude a contract with a collective when using content as provided by Article 27(1) of the UDHR or 15(1)(a) of the ICESCR. Thus it is difficult to see mere freedom of contract form foundations for liability. Accepting freedom of contract as a starting point would also make the distinction between individualistic and collectivistic copyright theories obsolete.

*of authors' rights* or by adopting legislation requiring users to inform authors of any use made of their productions and to remunerate them adequately.”<sup>468</sup>

The statement is ambiguous as it does not define what “collective administration” aiming to “prevent ... use” means. It is difficult to find *any* fundamental rights entitling to “prevent” use of copyrighted content. Even the aim and purpose of individualistic copyright theory is to secure rights of authors and users by *enabling use*, which in a property right system should take place through individual transactions. It is even more difficult to find justifications to “prevent use” through collective administration as the purpose of collective administration is especially to *enable use* in cases where individual administration is not possible.

It may be asked if the emphasis of the citation is on preventing *unauthorized* use. However, if this is the case it is difficult to see how the task of “preventing” could be accomplished “by establishing systems of collective administration of authors’ rights”. As explained, the purpose of collective administration should be enabling use as individual licensing is deemed impossible. Moreover, preventing unauthorized uses (“stealing”) should belong to public officials, in practice to the police. For example, the Finnish Constitution is skeptical regarding the possibilities to grant public power to bodies other than public authorities. As the Section 124 of the Constitution of Finland states:

“A public administrative task may be delegated to others than public authorities only by an Act or by virtue of an Act, if this is necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered. However, a task involving significant exercise of public powers can only be delegated to public authorities.”

According to the Government Bill 1/1998 a public administration should be understood as covering a wide range of different tasks.<sup>469</sup> However, no open political debate has taken place regarding delegation of public power to legal persons in general or to collective management organizations administering copyrighted content in Finland.<sup>470</sup>

Even if it was attempted to assign public power to CMOs so that they could protect essential economic interests of (“ailing”) authors it would remain unclear how *preventing use* could secure this objective: In short preventing use is opposite to concluding transactions, which aims to secure essential economic interests of

<sup>468</sup> The Committee on Economic No.17, paragraph 31 (emphasis added).

<sup>469</sup> See Hallituksen esitys eduskunnalle uudeksi Suomen Hallitusmuodoksi (Government Bill) 1/1998, p. 179.

<sup>470</sup> Government Bill 28/2008 related to the implementation process of the Infosoc directive on the contrary specifically states that collective management organisations do not represent public authorities while acting as provided by the copyright law. See Government Bill, 28/2008, p. 104 – 105.

authors as postulated by Article 27.2 of the UDHR and Article 15(1)(c) of the ICESCR.<sup>471</sup> Therefore, it is difficult to see how tools of collective administration of rights could be used as “rights” for “preventing” even unauthorized uses. Thus, it is likely that nature of collective administration of rights have been misunderstood in the General Comment no. 17.<sup>472</sup>

Provided that the statement is not a misunderstanding, it would be very problematic from the viewpoint of the right to science and culture if collective power could “prevent” prosumers from enjoying their rights as provided by Article 27(1) of the UDHR and 15(1)(a) of the ICESCR. Such situation would also be problematic from a viewpoint of a prosumers right to privacy (provided the prosumer enjoys his/her right at home) and the prosumers right to life liberty and security of persons if a collective merely attempts to use coercion in order to prevent the use. Moreover, as explained earlier, different types of costs (inter alia taxes, salaries, administrative costs, accounting, costs for recreational activities...) also always incur for CMOs, their corporate affiliates and even for individual authors. For these reasons it would be difficult to consider proportionate that that rights prosumers should be close to non-existent in relation to interests of collective administration even if CMOs attempted solely to secure essential economic right of (“ailing”) authors. This is the concern this chapter highlights: as if there were no borders for collective power in relation to fundamental rights of prosumers because formal reading of law protecting individual (“ailing”) authors entitles even preventing use by collective means. It is especially questionable if legislator allows CMOs to demand that prosumers should rigorously honor individualistic copyright theory while CMOs themselves at the same time end up keeping compensations of non-affiliate authors who have never given consent for the use. It would be as though CMOs were considered to be above the rules others are expected to follow.

However, collective licenses may alleviate problems related to securing rights of prosumers if functional collective licensing systems for use of content on the Internet exist. The more theoretical the problems described above remain and the more easily collective licenses may be accepted. Therefore, as collective licensing systems have been introduced it shall next be evaluated whether they provide functional solutions regarding use of content on the Internet.

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471 It is possible that preventing certain uses is e.g. in the interest of affiliate corporations of CMOs in their attempts to regulate markets: preventing use of content by prosumers on the Internet may be more lucrative than granting affordable licenses as such licenses might compete with other forms of use generating more revenues.

472 The misunderstanding may be due to limited amount of literature discussing collective administration more comprehensively i.e. also from the viewpoint of users. For example, also in Finland the Constitutional Law Committee has stated that non-affiliate authors have wider rights to obtain compensations from CMOs than affiliated authors because non-affiliates have a separate right to ask compensation. See Statement of the Constitutional Law Committee PeVL 7/2005, vp., p. 7. It is quite clear that the separate right of non-affiliates to claim compensations from authors may at best in theory make their rights “wider” (or “better”) in comparison to member affiliates. This is because it is artificial to call a separate right to compensation “wider” unless it enables non-affiliates more compensations than to affiliates. If this is the case we may ask why we have CMOs granting collective licenses if one’s economic position better (“wider”) when staying outside the system. Thus it is evident that neither did the Finnish Constitutional Law Committee did not understand what it is doing when it evaluated collective licenses.

## 10 POSSIBILITIES TO OBTAIN COLLECTIVE LICENSES IN FINLAND

### 10.1. IN GENERAL

When evaluating possibilities to administer use of expressions through collective licenses it should first be noted that it is difficult to find attempts to cover all areas of science and art with collective licenses in the Western countries. For example, it is challenging to find CMOs or stipulations in law for collective licenses regarding the use of computer programs or videogames. In theory this should mean that obtaining direct licenses in these cases is possible. If this is not the case copyright system based on exclusive rights seems inactive as authors are not able to obtain compensations and prosumers are not able to use as rights in Article 27 of the UDHR suggest.

Due to the focus of this book this chapter evaluates possibilities of prosumers and educational institutions as users of science to obtain collective licenses for use of content on the Internet. However, as licenses are offered nationally the chapter evaluates licenses offered in Finland. In order to do so paragraphs in law for collective licenses shall be compared to licensing options as offered by five CMOs.<sup>473</sup> In this respect, it should be noted that no researcher is able (even if allowed) to go through all the proxies, assignment contracts or other agreements CMOs may have concluded regarding their possibilities to represent different right holders. Consequently, the following evaluation is based on information they publicly provide on their homepages.<sup>474</sup> Despite the mentioned problem, some type of picture regarding

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<sup>473</sup> The examined CMOs during fall 2011 – spring 2012 were Teosto (Finnish Composer's Copyright Society) Gramex (Copyright society for performing artists whose performances have been recorded on phonograms and producers of phonograms), Tuotos (Copyright association for audio-visual producers in Finland), Kopiosto (Copyright organization for authors, publishers and performing artists) and Kuvasto (a Copyright organization for artists from the field of visual arts). In Finland CMOs are in practice private registered associations as provided by Associations Act (26.5.1989/503). According to the Government Bill 28/2004 CMOs act based on proxies and on other agreements on transfer of rights and hence do not use public power. See Government Bill 28/2004, p.104 – 105. Regarding countries in general there are no clear answers whether collective administration is conducted via a public or a private entity. See e.g. *David Sinacore-Guinn*, *Collective Administration of Copyrights and Neighbouring Rights, International Practices, Procedures, and Organizations*. Little, Brown and Company, Boston, Toronto, London, 1993, p.220. According to Ficsor in "market-economy countries, private organizations dominate..." *Ficsor*, p. 136.

<sup>474</sup> Thus nothing in theory prevents CMOs to change what they stipulate on their homepages regarding licensing possibilities. It should be noted that this problem does not exist in cases of compulsory licensing as paragraphs in the law define the scope of the license.

licensing possibilities on the Internet may be formed. Before going into details, the scope of contractual and compulsory licenses shall be evaluated in general.

## 10.2. SCOPE OF COMPULSORY AND EXTENDED CONTRACTUAL LICENSE

In order to evaluate licensing possibilities, the scope of existing collective licenses shall be examined in general. Originally, extended collective licenses in Finland were drafted to certain *specific paragraphs* of the Finnish Copyright Act (hereafter FCA). These paragraphs described collective licensees for certain usage forms/technologies as e.g. for broadcasting and photocopying. Previously, the specific paragraphs provided also the extended effect to the licenses.

However, later on *general paragraphs* for collective licenses have been added to the FCA (in 1995 paragraph 26§ for contractual licenses in general and in 2005 paragraph 47a for a compulsory license described in paragraph 47).<sup>475</sup> The general paragraphs provide common rules for collective licenses such as a requirement that CMOs granting extended collective licenses should be approved by the Ministry of Education and Culture for the task. Consequently, it may be asked what the reciprocal relationship between specific and general paragraphs in the licensing systems is and especially whether it affects the scope of the licenses.

Regarding *compulsory licensing* specific paragraphs in the law stipulate that the whole scope of the license allows the use of content against compensation as widely as stated in the specific paragraph. It is irrelevant whether right holders under the defined use have assigned their rights to a CMO or not.

For example, paragraph 47 of the FCA enacts a compulsory license for using content of performing artists and phonogram producers for public performing, communicating to the public and simultaneous unaltered radio and television broadcasting. However, it does not cover “making available to the public ... works in such a way that members of the public may access them from a place and at a time individually chosen by them” i.e. on demand type services.<sup>476</sup>

A general paragraph connects a compulsory license in a specific paragraph to a certain CMO, which in practice necessitates that compensations must be collected

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<sup>475</sup> See Act amending the Copyright Act (446/1995) and Government Bill 287/1994. Similarly in Sweden Chapter 3a of the Swedish Copyright Act starts with general regulations about the contractual licensing system.

<sup>476</sup> Thus paragraph 47 of the paragraph stipulates the compulsory license whereas paragraph 47a of the FCA states the general paragraph connects a CMO to the compulsory license.



by a CMO that has been appointed for the task by the Ministry of Education and Culture. Thus, in practice the scope of the license is defined in the specific paragraph.

As it pertains to *contractual licensing* defining the scope of the license is more complex. A starting point in contractual licensing is that a CMO represents those right holders who have assigned their rights to it, but if an extended effect is provided by law a user may also use content of non-affiliate right holders. As explained, previously also contractual licenses with the extended effect were enacted in *specific paragraphs* describing a certain form of use/technology such as broadcasting or photocopying. Thus if such a paragraph existed, a user was allowed to use both rights of affiliate and non-affiliate right holders as described in the paragraph provided a CMO granted a license. However, nowadays general paragraph 26 of the FCA provides that a license granted by a CMO has an extended effect to non-affiliate right holders, if the Ministry of Education and Culture has approved the CMO in question to administer content from certain field of art or science used in Finland. Thus, nowadays *the general paragraph grants the extended effect* in the contractual licensing system. The change causes a curious situation as it may be asked what is the function of still existing specific paragraphs for contractual licenses, if both authority of CMOs to grant contractual licenses *and* the extended effect comes from the general paragraph?

The only logical interpretation to give relevance for the separation between specific and general paragraphs in the extended contractual licensing system seems to be that although the extension to content of non-affiliates is stipulated in the general paragraph, the extension applies only in those situations which are described in the specific paragraphs (e.g. for broadcasting or photocopying) provided a certain CMO has been appointed to grant licenses accordingly. This is because it would be problematic to argue that extended effect comes merely from the general paragraph since if this was the case purpose of specific paragraphs would be unclear.<sup>477</sup> Therefore, it is understood in the book that in order for the extended effect for a contractual license to exist CMOs should be appointed to administer rights as stipulated in specific paragraphs for contractual licenses.

An additional feature making the scope of the extended contractual license system even more unclear in comparison to a compulsory license is that although the extended effect exists, it may be argued that scope of the offered contractual licenses may be narrowed by CMOs in

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<sup>477</sup> It should be mentioned that a non-affiliate's possible right to opt out from the license is also in the specific paragraph. However, it is difficult to see that anything would prevent moving also the right to opt out to one subsection under the general paragraph e.g. by stating that "a non-affiliate has always a right to opt out except in the following cases [list of forms of use/technologies]". In cases of compulsory licensing the need for specific paragraphs is understandable as they provide the scope for the whole license.



comparison to what specific paragraphs in law stipulate.<sup>478</sup> Provided this is possible the scope of contractual licenses is even more obscure as a mere specific paragraph in law would not yet tell us whether a user is entitled to use content in a way the specific paragraph provides even if a CMO has been appointed to grant licenses accordingly. However, it should be mentioned that the described interpretation may also be disputed. Enacting a paragraph to law, which provides a collective license implies that individual licensing is impossible. Therefore, it may be asked if narrowing a license should be accepted, if it is not possible for a user to obtain corresponding license elsewhere. As explained, if the rights of users were denied in situations when obtaining licenses is impossible, we would be “maximizing misery” as authors would not get compensations and users were unable to use. Denying use would be especially problematic if use is covered by a certain fundamental rights. Thus, regarding collective licensing this alternative interpretation would mean that use should be exempted from copyright in cases when a specific paragraph for a collective license describing exists, but no corresponding licenses are being offered. Alternatively, other means should be used to secure rights of authors and users.

Consequently, it may be concluded that a compulsory license allows use against compensation, as defined by a certain paragraph in law. In practice an appointed CMO collects the compensations. As it pertains to contractual licensing a contractual license may have an extended effect only if a certain CMO has been appointed by the Ministry of Education and Culture to grant licenses as defined in a certain paragraph. If the appointed CMO narrows down the license the user should have rational possibilities to obtain corresponding licenses elsewhere. If this is not possible one should allow use, as denying it would lead to “maximization of misery”. To what extent licenses are being offered in practice for prosumers shall be evaluated next.

### 10.3. LICENSES FOR PROSUMERS

This chapter evaluates to what extent it is possible to obtain collective licenses for prosumers to make content available to the public on the Internet as provided by subsection 1 of Article 27 of the UDHR and 15(1)(a) of the ICESCR.<sup>479</sup> Considering

<sup>478</sup> If a license with an extended effect is narrowed, the result applies also to non-affiliates i.e. the extended effect allows users to use content of non-affiliates only to the same extent the contract allows them to use rights of affiliates.

<sup>479</sup> *A fair access to market*, which is connected to the principle of equality before law and to the right to work and freedom to engage commercial activity as stated in e.g. in article 23 of the Universal Declaration, could also be regarded as a right on a fundamental right level for prosumers in economical terms to be able to use content. However, if prosumers are understood as private natural persons acting in non-commercial it questionable if a fair access to market may be considered as a right for a prosumer. About the fair access to market see e.g. Juha Pöyhönen (nowadays Karhu), Uusi

the availability of different content types, an extensive license to make content openly available on the Internet should in theory be offered for prosumers in order to secure their rights and respectively rights of authors to the extent individual licensing is not possible. However, no specific paragraphs providing collective licenses for prosumers as private persons exists in the FCA. Despite this it may be understood that some collective licenses are being offered also to prosumers.

For example, it may be interpreted that Teosto and Gramex (collecting societies in Finland) at least in theory offer licenses also for prosumers as private persons. This is because the licenses they are offering focus more on the “ways of use” instead of specific users such as educational institutions, archives, libraries or museums. They offer licenses for activities such as “downloading”, video on demand (“VOD”), “podcasting”, “Internet radio”, “Internet license”, “simulcasting”, “webcasting”, “voice samples” and “TV-simulcasting”.<sup>480</sup> Teosto also specifically states that some of its licenses are offered also for private persons.<sup>481</sup> Although the licenses do not contain an extended effect to non-affiliates as there is no specific paragraph providing the extended effect, it is positive from a prosumers viewpoint to the extent licenses are being offered.

However, the practical relevance of the offered licenses remains somewhat unclear. As there are no specific paragraphs in law for prosumers, the scope of the offered licenses does not extend to non-affiliates narrowing down the scope of offered licenses. Offered licenses also define certain forms of use. Due to the technological convergence it is questionable what the forms specifically cover.<sup>482</sup> It is also questionable whether the pricing may be regarded reasonable from a prosumers perspective. For example, Teosto’s Internet license for streaming music for maximum of 9 hours per month costs approximately 165 euro, if the amount of monthly visitors is 2.000 or less. If the monthly amount of visitors is 80.000, the monthly price is 647 euro. If a prosumer would like to share recorded music (which seems to be a popular way of sharing music on the Internet among prosumers) a problem is that a prosumer would need a license both from Teosto and Gramex. Even if a similar license with similar price were offered by both of the CMOs, it is clear that the price easily becomes an obstacle for any prosumer: the minimum fee would be 330 euros a month for making music available to the public for 9 hours per month for 2.000 visitors.

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varallisuusoikeus, Helsinki, Kauppakaari 2000. See also Raimo Siltala, *Perusoikeusjärjestelmän sisäisestä logiikasta*, Lakimies 4/2001, p. 737–744, and especially p. 740–741.

480 Compare Teosto’s and Gramex’s homepages and the licensing options they offer for Internet use. On Teosto’s behalf: <http://www.teosto.fi/kayttajat/luvat/273/m/305> and on Gramex’s behalf: [http://www.gramex.fi/fi/musiikin\\_kayttajat/sahkoinen\\_media\\_ja\\_av-tuotanto](http://www.gramex.fi/fi/musiikin_kayttajat/sahkoinen_media_ja_av-tuotanto). It should be mentioned that if recorded music is being used permissions should be asked from both of CMOs unless the compulsory license as stated in paragraph 47 applies to the situation regarding rights of performing artists and phonogram producers.

481 See Teosto’s Internet license (in Finnish) at: <http://www.teosto.fi/kayttajat/luvat/273/m/305>.

482 Regarding technological convergence, see chapter 6.4.

However, it should also be noted that Teosto has also started offering licenses for prosumers to upload music on the Internet (i.e. place music for others to download).<sup>483</sup> Regarding these licenses pricing seems reasonable even for a prosumer.<sup>484</sup> For example, in 2013 price for making content available to the public in order for receivers to download it was 0,07 euros per track.<sup>485</sup> This would mean that a license to make available to the public a CD with 10 tracks for others to freely download would cost 0,7 euros per download. If similar license was offered by Gramex for performing artists and phonogram producers, price for sharing the CD with 10 songs would be 1,4 euro per download. A problem in this respect is that Gramex does not offer corresponding licenses for prosumers to make content available to the public.<sup>486</sup>

Therefore it may be concluded that at the moment it seems that prosumers are at best able to obtain rather narrow licenses, which they often unlikely afford to pay. In this respect, the situation seems problematic from the viewpoint of the right to culture and science provided in Article 27(1) of the UDRH and 15(1) of the ICESCR (provided collecting societies may endanger it in the first place).<sup>487</sup>

## 10.4. OFFERED LICENSES FOR EDUCATIONAL AND SCIENTIFIC PURPOSES IN FINLAND

When evaluating possibilities to use content on the Internet for educational and scientific purposes, it is positive to note that paragraph 14 of the FCA provides a specific paragraph for a wide contractual license to reproduce and make available all types of works on the Internet for educational and scientific purposes.<sup>488</sup> As no paragraph for prosumers exists in the FCA, a wide paragraph 14 of the FCA provides a contrast to compare whether enacting paragraphs has an effect to the scope of offered licenses.

483 See Teosto's homepage (in English) available at: <http://www.teosto.fi/en/teosto/articles/internet-and-mobile-pricelists>.

484 If these licenses are offered also per song, it may be asked whether they are collective licenses or individual licenses granted by a collective. The difference is in practice ostensible.

485 It should be noted that the used word "track" leaves somewhat open if the price is per song or something else. See Teosto's pricing list for 2013, available (in English) at: [http://www.teosto.fi/sites/default/files/files/P13\\_Download%202013.pdf](http://www.teosto.fi/sites/default/files/files/P13_Download%202013.pdf).

486 Gramex seems to be unable (or unwilling) to grant licenses e.g. for downloadable music. See www-page of Gramex regarding use of recorded music on the Internet available at (in Finnish) [http://www.gramex.fi/fi/musiikin\\_kayttajat/sahkainen\\_media\\_ja\\_av-tuotanto/aanitteet\\_internetissa/aanitenaytteet\\_internetissa](http://www.gramex.fi/fi/musiikin_kayttajat/sahkainen_media_ja_av-tuotanto/aanitteet_internetissa/aanitenaytteet_internetissa).

487 See also Helfer stating: "Nevertheless, the Committee's [on Economical, Social and Cultural Rights] reference to the price that consumers pay to access copyrighted works as part of the overall balance of creators' rights suggests that States must provide some form of meaningful regulation of [CMO] licensing practices to comply with their obligations under the Covenant [on Economic, Social and Cultural Rights]." *Helfer*, p. 91.

488 Literal reading of the law excludes television and radio broadcasts (they are provided in paragraphs 25f – 25i of the FCA) and producing copies by photocopying or in similar means (provided in paragraph 13 of the FCA) from the scope of the paragraph. (Producing copies in "similar means", as stated in article 13, refers to producing copies by printing them on paper as the result is similar to producing photocopies.) See Government Bill 28/2004, p. 85.

Since paragraph 14 of the FCA is wide, it also in theory implies that everybody contributing content for educational and scientific purposes should join the CMO granting the licenses for use of content for educational and scientific purposes in order maintain a possibility to obtain compensations in case their content happens to be used. In fact, if we regard that all protected expressions may have educational or scientific relevance (as they may have in theory), paragraph 14 postulates that everyone producing content should assign their rights to an appointed CMO in case their content is being used.<sup>489</sup> As it pertains to the distribution of compensations, this type of development would seem to lead in the long run to certain type of “democracy through collectives”, provided CMOs follow democratic principles in their decision making. However, as explained, one cannot merely focus on evaluating paragraphs in law when evaluating possibilities to obtain licenses as CMOs may narrow down licenses in comparison what the law stipulates. Consequently, the next chapters evaluate licenses offered by five CMOs in Finland for use of content for educational and scientific purposes on the Internet.<sup>490</sup>

#### 10.4.1. KOPIOSTO

In practice, Kopiosto (a Copyright organization for authors, publishers and performing artists) has been offering licenses to certain educational institutions as provided by paragraph 14 of the FCA.<sup>491</sup> It has been granting licenses to primary schools, vocational training and universities.

In general, licenses offered by Kopiosto are technology -neutral licenses, which allow staff and students of educational institutions to scan printed publications into digital form, copy text and pictures that are openly available on the Internet and communicate the scanned and copied content in the institutions closed network.<sup>492</sup> The licenses cover both content of foreign and domestic right holders and allow using their content for teaching, research, theses and practical works.<sup>493</sup> Elsewhere,

489 It should be noted that the paragraph does not specifically rule out prosumers from its scope. However, as prosumers as private natural persons are rely perceived users of content for educational or scientific content, it shall be assumed here that prosumers are not users as intended by the paragraph.

490 Another thing is whether narrowing down licenses should prevent users from using as an existing paragraph for a collective license implies that obtaining individual licenses is impossible. As explained, if users were unable to use in a situation when no licenses are being offered we could talk of “maximizing misery” as right holders would be unable to receive compensations and users would be unable to use.

491 Kopiosto e.g. administers use for taking photocopies and using radio- and TV-programs in education. In 2010 Kopiosto had 44 member organizations and it has approximately 41.500 proxies. At its www-site Kopiosto refers to paragraphs 14 and 26 of the FCA and states that it has the right represent those publishers who have not assigned their rights to Kopiosto. This indicates that Kopiosto has also been appointed by the Ministry of Education and Culture to grant extended contractual licenses as provided by the mentioned paragraphs. See e.g. Kopiosto’s internet site: [http://www.kopiosto.fi/kopiosto/teosten\\_kayttoluvat/digilupa/digilupa\\_ukf/fi\\_FI/digilupa\\_ukf/#\\_element\\_85644430453964959](http://www.kopiosto.fi/kopiosto/teosten_kayttoluvat/digilupa/digilupa_ukf/fi_FI/digilupa_ukf/#_element_85644430453964959).

492 Newspapers, books, magazines, research rapports and manuals have been regarded as printed publications.

493 It should be mentioned that right holders have a possibility to ban the use. However, as mentioned the right is a rather theoretical one difficult if not impossible to supervise. For example, while this is being written only one publisher has

but in universities, a requirement also is that a user registers and “stamps” the content to the database of Kopiosto before using it. However, if a user is able to obtain an individual license (e.g. if a certain piece of content has been licensed with a Creative Commons license), s/he may use it according to the terms of the individual license.<sup>494</sup>

It is positive from the viewpoint of this article that licenses for educational and scientific use are available. Considering possibilities to obtain licenses, the problem is that the scope of the contractual licenses offered by Kopiosto is in practice rather narrow. The licenses are offered for specific educational institutions (excluding the general license for Universities and vocational high schools) and allow only use for specific groups of students provided that the copies are produced or communicated by the teacher or someone on his/her initiative. They do not cover all content types (as they exclude notes, song lyrics, music, dramatic works, audio-visual works, work or exercise books, videogames and computer programs) and do not extend their scope outside educational institutions. Furthermore, the licenses do not allow making content available to students via email or posting content to Internet as an open network, but necessitates that the network is closed and only for the purposes of the educational institution in question. Thus, in the end the offered licenses are not for the Internet as an open network but for a closed group/environment. Used material must also be removed from the database of the institution no later than at the end of the academic year.<sup>495</sup> Therefore, we may see that although a paragraph in the law describes wide possibilities to grant licenses, the offered licenses may in the end be rather narrow.

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attempted to opt out from the system. See: Kopiosto's homepages: [http://www.kopiosto.fi/kopiosto/teosten\\_kayttoluvat/valokopiointi/fi\\_FI/kopioinnin\\_kieltaminen/](http://www.kopiosto.fi/kopiosto/teosten_kayttoluvat/valokopiointi/fi_FI/kopioinnin_kieltaminen/). Even it has done so it has no practical means to supervise if or to what extent the ban is respected.

494 The requirement to stamp means reporting used content to Kopiosto in order for Kopiosto to distribute collected compensations to appropriate right holders. However, due to the immense content mass it is problematic to fulfil such a demand in practice. No such requirement either exist as it pertains to photocopied content either as the use is evaluated thorough studies using sampling as a method. Considering the masses of content on the Internet it is peculiar that an attempt to register each used www-pages (the obligation would be giving the web address of the used www-page) has been even made. A www-page as such does not yet explain what and whose content is there or has been. If the used www-page is closed one can neither evaluate it later. Kopiosto could of course attempt to create a large database for itself containing copies of all the used www-pages, but producing these copies to the database would require itself to ask permissions from each appropriate right holder whose content has been on the registered www-page. Consequently it is difficult to see how the requirement to stamp could be followed.

495 See Kopiosto's permission for primary schools and vocational training, available at (in Finnish): [http://www.kopiosto.fi/kopiosto/teosten\\_kayttoluvat/digilupa/fi\\_FI/digilupa/](http://www.kopiosto.fi/kopiosto/teosten_kayttoluvat/digilupa/fi_FI/digilupa/) and frequently asked questions. Available at (in Finnish): [http://www.kopiosto.fi/kopiosto/teosten\\_kayttoluvat/digilupa/digilupa\\_ukk/fi\\_FI/digilupa\\_ukk/#a\\_element\\_85638224033810411](http://www.kopiosto.fi/kopiosto/teosten_kayttoluvat/digilupa/digilupa_ukk/fi_FI/digilupa_ukk/#a_element_85638224033810411).

#### 10.4.2. OTHER CMOs

Also other CMOs have been offering licenses for educational purposes. Tuotos (a Copyright association for audio-visual producers in Finland) offers licenses to present and communicate domestic movies in premises of educational institutions. It is again positive that possibilities to obtain licenses for using domestic movies in educational institutions exist, but also in this case the problem is the narrowness of the license. According to www-pages of Tuotos the license is not an extended contractual license and is additionally limited to domestic movies and to premises of educational institutions.<sup>496</sup> In other words, it is also limited to closed environments from the viewpoint of the Internet.<sup>497</sup>

Kuvasto (a Copyright organization for artists from the field of visual arts) offers licenses to use pictures on the Internet, but does not specify educational institutions as possible users. Instead, it mentions municipal and foundation based departments for culture, public utilities, companies and commercial exhibitions.<sup>498</sup> Therefore, if interpreted as written on the homepage of Kuvasto, no licenses for use of pictures in educational purposes are offered. This may be because the abovementioned licenses granted by Kopiosto cover also use of pictures in educational use and Kuvasto is a membership organization of Kopiosto.<sup>499</sup>

Finally, as it pertains to possibilities to use music on the Internet in educational institutions, licenses offered by Teosto (a copyright organization for composers, lyric writers, arrangers and music publishers) and Gramex (a CMO administering rights of performing artists whose performances have been recorded on phonograms and producers of phonograms) shall also be examined as the license offered by Kopiosto does not cover music. It should first be noted that neither of the CMOs offer a license specifically intended for the use of music on the Internet in educational institutions. As explained, they instead offer licenses such as “downloading”, video on demand (“VOD”), “podcasting”, “Internet radio”, “Internet license”, “simulcasting”, “webcasting”, “voice samples” and “TV-simulcasting”.<sup>500</sup> Therefore, regarding the use of music on the Internet CMOs seem to be more interested in different “ways of use” rather than particular users or institutions. Consequently, one might assume that licenses offered by Teosto and Gramex may be applied also in educational institutions, if music is used in a way described by the licenses. However, the licenses

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496 Tuotos provides a list of movies that may be used in education. See (in Finnish) at: <http://www.tuotos.fi/index.php?id=480>.

497 The license is limited to movies Tuotos represents. See licences offered by Tuotos at (in Finnish) at <http://tuotos.fi/index.php?id=477>. The license should have an extended effect, if Tuotos is appointed by the Ministry of Education and Culture as a CMO able to grant extended contractual licenses.

498 See licenses of Kuvasto, available at (in Finnish): <http://www.kuvastory.fi/index.php?cat=41&lang=fi&mstr=1>.

499 This would mean that Kopiosto would distribute some of the collected compensations to Kuvasto.

500 Compare Teosto's and Gramex's homepages and the licensing options they offer for Internet use. On Teosto's behalf: [http://www.teosto.fi/fi/internet\\_ja\\_mobiili.html](http://www.teosto.fi/fi/internet_ja_mobiili.html) and On Gramex's behalf: [http://www.gramex.fi/fi/musiikin\\_kayttajat/sahkoinen\\_media\\_ja\\_av-tuotanto](http://www.gramex.fi/fi/musiikin_kayttajat/sahkoinen_media_ja_av-tuotanto). It should be mentioned that if recorded music is being used permissions should be asked from both of CMOs unless the compulsory license as stated in paragraph 47 applies to the situation regarding rights of performing artists and phonogram producers.

offered by Teosto and Gramex are not identical.<sup>501</sup> For example, in certain occasions the CMOs state that licensing situations should be evaluated case by case.<sup>502</sup> Thus, it seems that no possibilities to obtain licenses always exist even if one contacted both of the CMOs. Moreover, it should be mentioned that even if an educational institution is able to find a collective license suitable for use of music it is unclear whether it would be ready to pay the required fee. Consequently, it is difficult to give explicit answers covering different situations regarding possibilities to obtain licenses for use of music for educational or scientific purposes making the situation obscure.

## 10.5. CONCLUDING REMARKS

The above analysis indicates that it is questionable whether collective licensing is a suitable manner to solve licensing questions on the Internet. To the extent collective licenses are being offered, they are rather narrow. For example, as it pertains to contractual licenses for copying and making content available for educational and scientific purposes, they apply only in closed environments and contain restrictions regarding use e.g. in relation to content types and ways/forms of use.<sup>503</sup> As it pertains to possibilities of prosumers to obtain licenses, offered licenses are often too expensive or limited to certain forms of use. A problem also is that needed licenses from different CMOs do not necessarily correspond with each other even if one CMO was willing to grant more comprehensive licenses. Compulsory licenses would provide simpler solutions in comparison to contractual licenses, but it is difficult to find any that would be applicable compulsory licenses for use of content on the Internet.

It should be mentioned that it is difficult to see that alternative means to secure use of content on the Internet would endanger position of authors. At the moment offered licenses are rather narrow, if they are

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501 For example, regarding podcasting Teosto refers to programs *similar to radio*, containing speech and music (emphasis here) but Gramex (a Finnish collective management organisation performing artists and phonogram producers) refers use similar both to *television and radio*. Regarding “podcasting” see e.g. homepages of Teosto (in Finnish: <http://www.teosto.fi/fi/podcasting.html>) Gramex (in Finnish: [http://www.gramex.fi/fi/musiikin\\_kayttajat/sahkoinen\\_media\\_ja\\_av-tuotanto/aanitteet\\_internetissa/podcasting](http://www.gramex.fi/fi/musiikin_kayttajat/sahkoinen_media_ja_av-tuotanto/aanitteet_internetissa/podcasting)) It could also be mentioned that Teosto also offers a license for downloading, but Gramex does not seem to offer a similar license. For example, as it pertains to use of recorded music on the Internet Gramex provides a list of different usage situations when it cannot grant a license. See e.g. homepage of Gramex, available at [http://www.gramex.fi/fi/musiikin\\_kayttajat/sahkoinen\\_media\\_ja\\_av-tuotanto/aanitteet\\_internetissa](http://www.gramex.fi/fi/musiikin_kayttajat/sahkoinen_media_ja_av-tuotanto/aanitteet_internetissa).

502 See e.g. Teosto’s license regarding video on demand (<http://www.teosto.fi/fi/vod.html>) and Gramex’s license regarding podcasting ([http://www.gramex.fi/fi/musiikin\\_kayttajat/sahkoinen\\_media\\_ja\\_av-tuotanto/aanitteet\\_internetissa/podcasting](http://www.gramex.fi/fi/musiikin_kayttajat/sahkoinen_media_ja_av-tuotanto/aanitteet_internetissa/podcasting)).

503 It could also be mentioned that although paragraph 14 of the FCA came into force already in 2007, in practice no comprehensive licenses as described by it has been concluded between any CMO and educational institutions. Even the comprehensive license between the Ministry of Education and Culture and Kopiosto covering Universities and vocational high schools is narrowed to certain content types and closed networks of the educational institutions.

being offered at all as it pertains to use of content by prosumers. This means that authors cannot receive any compensation in any case when no licensing possibilities exist. How could an alternative mean securing at least some compensation be worse from an author's perspective? How come the situation would be worse for an author even if use of content by prosumers was considered exempted from copyright as suggested by Article 27(1) of the UDHR as long as alternative means have been implemented? As long as no licenses are being offered and no alternative means implemented, authors cannot expect to receive compensations in any case.

A functional collective and especially contractual licensing system would necessitate that a sufficient amount of people organize themselves under adequate CMOs. In this respect it is difficult to see that merely enacting specific paragraphs for extended contractual licenses could solve licensing questions. In fact, as we all are content producers in information society, we should all in theory also organize ourselves under adequate CMOs. This would lead to some type of "democracy through collectives", provided all the content types on the Internet shall be administered collectively and CMOs act in a democratic manner.



# 11 PLATFORM FEES AND FUNDAMENTAL RIGHTS

## 11.1. IN GENERAL

Compensation mechanisms for compensating private copying for authors have existed in European countries for decades in the form of copying levies/platform fees.<sup>504</sup> They are essentially meant to cover acts conducted in the private sphere as it has been assumed that administering use taking place between private persons cannot be done individually.<sup>505</sup> Thus it may be described that justification for platform fees – impossibility of individual administration – is essentially the same as for the collective licenses. They have also been administered collectively in practice, e.g., in Finland through CMOs. However, they have not been exercised through exclusive rights in relation to prosumers. Nevertheless authors have obtained compensations. Therefore, as the analysis in chapter 6 indicated that direct licensing based on exclusive rights has not become much easier between authors and prosumers, it shall be evaluated from the viewpoint of fundamental rights if platform fees could provide a solution for securing rights of prosumers and authors.

Regarding platform fees in Europe Article 5(2) of the Infosoc directive allows use “(...) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right-holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Art. 6 to the work or subject-matter concerned.” The intention of the article is to compensate copying taking place in the private sphere, in practice by prosumers.

In practice, it is CMOs (or similar organizations) that collect the compensations as stipulated in Article 5(2) of the Infosoc directive.<sup>506</sup> Direct payer of the fees is a

504 See e.g. Prof. P. Bernt *Hugenholtz*, Dr Lucie *Guibault* and Sjoerd van *Geffen* *The Future of Levies in the Digital Environment*, Institute for Information Law 2003 (hereafter *Hugenholtz, Guibault and van Geffen*), p. 10 and 12. See also e.g. Committee Report 1974:21, Pohjoismaiden tekijänoikeuden tarkistamiskomitean mietintö osa I, Valokopiointi ja nauhoitus erityisesti opetus toiminnan piirissä, Helsinki 1974 and Committee Report 1982:63, Tekijänoikeuskomitean II osamietintö, Korvaus yksityisestä ääni- ja kuvanauhoitustoiminnasta, Tekijänoikeudellinen väliesmenettely, Tekijänoikeusneuvosto, Helsinki 1982.

505 *Hugenholtz, Guibault and van Geffen*, p. 1, *Huuskonen*, p. 204 and *Haarmann*, p. 184. Levies (or other mechanisms for collecting compensations collectively) for reprographic activities are in most countries directed towards acts accomplished in an institutional setting e.g. by libraries, government institutions and businesses. *Hugenholtz, Guibault and van Geffen*, p. 13.

506 *Hugenholtz, Guibault and van Geffen*, p. 14 ff. In Finland Section 26a(1) of the FCA states compensations for the reproduction of a work for private use “... shall be paid out to the authors through an organisation representing numerous authors of works in a certain field used in Finland in accordance with a plan for the use of the funds annually approved by the Ministry of Education.” In general see e.g. Yksityisen kopioinnin hyvitysmaksujärjestelmän kehittämistarpeet. Selvitys nykyisen hyvitysmaksujärjestelmän toimivuudesta, näköpiirissä olevista haasteista ja kehittämistarpeista. Opetus- ja kulttuuriministeriön työryhmämuistioita ja selvityksiä 2010:11, p. 14 – 16.

manufacturer, importer or other party acquiring the used device.<sup>507</sup> Consequently platform fees do not necessitate comparing exclusive rights of authors to different rights of prosumers. For this reason they are not either directly problematic from the viewpoint of a prosumers right to science and culture or from the viewpoint of a prosumers right to privacy or the right to life liberty and security of a person. In this respect platform fee or similar systems seem as potential tools for securing rights provided by Article 27 of the UDHR and 15 of the ICESCR.

However, due to collective nature of the system it is difficult align compensations to authors according to use of prosumers. This means that in the system prosumers occasionally have to pay even if they did not use content of authors, whereas authors on the other hand may not receive compensations even if their content was used. Provided users are nevertheless able to use and essential interests of authors are secured, these problems may be considered from a fundamental right perspective tolerable. However, it is often argued that it is not allowed to take private copies from illegal sources. Consequently, it has been claimed that it is not possible to apply the levy system to copies from illegal sources either. If the latter argument is accepted, the applicability of platform fees is narrowed down to copies from legal sources. Therefore it shall next be evaluated how a demand for a legal source has been reasoned from the viewpoint of fundamental rights. Why should it not be possible to apply platform fee system in order to secure the right to science and culture and rights of authors, if the source of use is illegal? What is been protected in such case?

## 11.2. A REQUIREMENT FOR LEGAL SOURCE AND FUNDAMENTAL RIGHTS

### 11.2.1. A FORMAL REQUIREMENT?

Although the Infosoc directive does not specifically enact that private copies cannot be produced from illegal sources, statements to that direction have often been presented.<sup>508</sup> Consequently it may be asked how *both* fundamental rights as provided by Article 27 of the UDHR and 15 of the ICESCR relate to possible “illegal sources”.

At first, it should be noted that unless an author grants permission, copies are always produced from an illegal source unless an exemption/ limitation exists.

507 In words of *Hugenholtz, Guibault and van Geffen*: “As a rule, the obligation to pay the remuneration imposed on recording or reprographic equipment as well as on blank recording media does not lie on the consumer, but rather on the manufacturers, importers, or intra-community acquirer of such devices and media. ... In the majority of cases, manufacturers and importers of reproduction equipment or media pass the charge on to the consumers by means of the sales price such equipment or media. Geller observes that ‘where levies are imposed, for example, on the sales price of a copy machine, facsimile machine, or blank-recording tapes, there is only an intrusion at that point where these instruments enter commerce, not in private life.’” *Hugenholtz, Guibault and van Geffen*, p. 18.

508 See e.g. *Haarmann*, p. 159, *Hugenholtz, Guibault and van Geffen*, p. ii – iii and Ismo Kallioniemi, Tekijänoikeudellisista kysymyksistä vertaisverkossa, Defensor Legis N:o 3/2001 (hereafter Kallioniemi), p. 503 – 504.

Thus, it may be asked if there is some type of a “special right” behind the “legal source-requirement” explaining why platform fees or alternative similar limitations/exemptions making an illegal source legal could not be used. In other words, what is being protected if concluding individual transactions is impossible, collective licenses do not provide a solutions but it is not allowed to use a platform fee or a similar system to protect rights of prosumers *and authors* as enshrined in Article 27 of the UDHR and 15 of the ICESCR? If such “special right” exists, the “legal source”-requirement would seem to elevate itself above fundamental rights of prosumers and authors. Therefore, in order to evaluate the situation we must find reasoning for the “legal source” requirement.

Considering the above mentioned, it is not surprising that it is difficult to find specific material justifications why illegal sources should be in a particular position. Instead the provided reasoning why content may be used only from a legal source is rather formal. It has simply been stated that it would not be right if an illegal copy could become a legal copy if it was produced with the help of a limitation. If this were the case, illegal copies would become legal. According to the Finnish legislator these types of situations would be unacceptable “in principle”.<sup>509</sup> The justification is somewhat curious as all copies are from illegal sources unless a limitation has been enacted (or permission granted). Perhaps there is some logic in the reasoning when we follow the traditional formal relationship of exclusive rights (main rule) and provided exemptions/limitations (exceptions to the main rule). However, the approach it may be eventually criticized when we attempt to find material justifications for it.

A problem of a mere formal argument based on internal logic of copyright system (main rule versus exception to the main rule) is that it does not take into consideration material argumentation at all. In other words, as the aim of limitations is always to make illegal use legal, a mere formal argument based on internal illogicality of copyright system does not define at all what the right that should be protected “in principle” is. If material arguments are being ignored, not only objective of copyright itself (to secure essential economic rights of authors), but also material rights protecting users are being forgotten even if they belonged to core area of a certain fundamental rights.<sup>510</sup> In other words, why could we not allow producing copies from illegal sources if compensations for authors were secured and users were allowed to use as postulated by Article 27 of the UDHR and 15 of the ICESCR?

509 See Government Bill 28/2004, p. 52 and similarly *Kallioniemi*, p. 503 – 504.

510 The same problematic assumption may found from the Finnish contractual licensing system. Government Bill 28/2004 (p. 74) postulates that use under contractual licensing necessitates that a user has obtained the work legally. It is difficult to understand why a user should have a legal copy at hand in order use it with permission from a right holder, in this case a CMO representing adequate right holders. It is true that the person who conducted the illegal act before should be held liable for it. However, if someone is willing to obtain permissions against compensation for the subsequent uses and a right holder is willing to grant them, why should this be prevented? Who benefits and how from preventing interested right holders and users from conducting business with each other?

Who would lose/what would be protected if users were able to use and authors would get compensations? Moreover, in addition that the requirement is merely a formal one, it may be asked if it is (at least in Finland) also theoretical.

It could already at this point be stated that to the extent copyright primarily protects corporate interests, the situation would mean that interests of private legal persons have been elevated above fundamental rights of prosumers and authors with rhetoric's demanding "legal sources".<sup>511</sup> From a corporate perspective, it would be logical to prevent use of content on the Internet even through a platform fee or similar system, if it is considered that the generated revenues are smaller than losses the system would cause to other content markets. However, this is problematic as it is difficult to see that "market control" or similar interests could be elevated above fundamental rights.

### 11.2.2. A THEORETICAL REQUIREMENT?

Regardless of the above mentioned national legislations may entitle using content produced from an illegal source. For example, producing copies for private purposes from illegal sources is possible in Finland. It has been regarded that although it is illegal to produce copies from illegal sources it is not punishable to do so, if a prosumer produces only few copies. The justification for not making it punishable is that it is not possible to always know whether a certain expression has been placed on the Internet with the permission of the right holder.<sup>512</sup> A prosumer may have to pay compensations and be subject to forfeiture of the copy, if s/he knew that the copy was produced from an illegal source.<sup>513</sup>

Thus, although producing private copies is illegal, the outcome is that the system in practice already resembles a platform fee (or similar) compensation system: a prosumer is able (although formally not allowed) to produce copies. If s/he knew that the copies were from an illegal source, s/he should pay compensation.<sup>514</sup> This

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511 This would be a rational aim for a corporation in practice if it believed that platform fee/levy systems are not capable of maximizing its profits as they would compete with other, more lucrative, sources of income.

512 Relevance has also been given to small quantities (and quality) of copies taken by prosumers in individual cases. See e.g. Section 56a of the FCA, Government Bill 28/2004, p. 52 – 53, and *Haarmann*, p. 159.

513 See Sections 57 and 58 of the FCA, Statement of the Constitutional Law Committee 7/2005, p. 4 and *Harenko, Niiranen & Tarkela*, p. 89 – 91.

514 It is true that a prosumer is also subject to forfeiture of the copies if s/he knew that they were from an illegal source. However, it may be asked why this should be the case if the prosumer pays adequate compensation i.e. the result is as postulated by Article 27 of the UDHR and 15 of the ICESCR: a prosumer obtains a copy and the author get compensations.

implies that, as it pertains to copies produced by prosumers, the requirement for a legal source is close to theoretical.<sup>515</sup>

One has deviated from the legal source-requirement also in certain other occasions. For example, temporary reproductions enabling use on the Internet as provided by FCA 11a of the FCA (corresponding Article 5(1) of the Infosoc directive) has also been allowed in Finland even if the source is illegal. This is understandable from the viewpoint of freedom of expression as e.g. use of Internet would not be possible as it is used today if copies referred in Article 5(1) of the Infosoc directive were not exempted. Moreover, the legal source-requirement in Finland does not concern public displaying and public presenting of expressions. Only producing copies from illegal sources is unacceptable.<sup>516</sup> This would mean that platform fees could be used to make content available on the Internet. It has also specifically been allowed to take citations (Section 22 of the FCA) even if the source of the content is illegal.

Moreover, it is worthwhile to note that certain acts in archives, libraries and museums (Section 16 and 16a – 16c of the FCA) and use of work when the administration of justice or public security so requires (Section 25d, subsection 2 and 5 of the FCA) have been allowed even if the source was an illegal copy. For example, Section 16(b) of the FCA (Use of works in libraries preserving cultural material) allows a defined library to “make copies of works made available to the public in information networks for inclusion in its collections” without an obligation to pay compensations to authors. This is noteworthy as from the viewpoint of fundamental rights we do not need to see these exemptions as exemptions protecting first generation individual rights such as the right to science and culture, but instead as exemptions protecting collective cultural rights.<sup>517</sup> In other words, if exemptions may be enacted in such cases it should be even more easier to enact them in order to protect rights of prosumers as first generation liberty rights especially as the mentioned institutions (libraries as a clear example) particularly exist for prosumers.<sup>518</sup> This again implies that no weight in the evaluation has been given to the right to science and culture as provided in Article 27(1) of the UDHR and 15(1)(a) of the ICESCR.

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515 If one does not accept the interpretation that e.g. the Finnish situation already resembles a platform fee system, we come back to the original question: who benefits from preventing use against compensation?

516 See Section 11, subsection 5 of the FCA. See the Finnish Copyright Act (1961/404) in more detail (in English) <http://www.finlex.fi/en/laki/kaannokset/1961/en19610404.pdf>. See also Kristiina Harenko, Valtteri Niiranen and Pekka Tarkela, Tekijänoikeus – kommentaari ja käsikirja, Porvoo 2006 (hereafter Harenko, Niiranen & Tarkela), p. 88 – 89.

517 For example, Harenko, Valtteri Niiranen and Pekka Tarkela in general terms speak of “important societal interests” when referring to use of work when the administration of justice or public security so requires. See Harenko, Valtteri Niiranen and Pekka Tarkela, p. 198.

518 It could be mentioned that the section also allows even communicating published works to a member of a public on certain conditions. See Section 16(b) of the FCA and Harenko, Niiranen and Pekka Tarkela, p. 133 ff.

### 11.3. CONCLUDING REMARKS ON PLATFORM FEES

Levies/platform fees have been introduced for the same reasons as collective licenses: it has been considered impossible to administer rights individually. As they are collected from other actors but prosumers, they do not pose similar direct problems in relation to the rights of prosumers as exclusive rights do.

It is difficult to see that a requirement for a legal source could prevent using platform fees as it is unclear what a requirement for a “legal source” materially “in principle” protects from the viewpoint of fundamental rights. In other words if a levy/platform fee system secures rights of prosumers and authors it is difficult to see why it could not be used.<sup>519</sup> This is also supported by a notion that national legislation may allow use of content from illegal sources in occasions that are not as strongly protected as rights of prosumers from the viewpoint of fundamental rights analysis. In other words if producing copies is allowed for libraries, it is difficult to understand how it could be denied from prosumers. Moreover, in practice the Finnish system already resembles a platform fee system: if a prosumer knowingly produces a copy from an illegal source, s/he must pay compensations for producing it. Thus, it is difficult to see that in the light of fundamental rights something could prevent using platform fee or similar alternative compensation models in order to secure rights of prosumers and authors. Another thing is that compensations should be directed to those (“ailing”) authors in need in order to claim that a platform fee/levy system has a fundamental right extension from an author’s perspective.<sup>520</sup>

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519 Even if (for some reason) one argued that impossibility to use content is not problematic for authors, the situation would clearly be problematic from the viewpoint rights of prosumers as provided by Article 27(1) of the UDHR and 15(1)(a) of the ICESCR (or the right to privacy if considered as the proper right). Moreover, it should be remembered that producing copies from illegal sources may also in some occasions lead to indirect benefits for authors (e.g. through network effects) even if no direct compensation was secured for authors.

520 At the moment compensations are not distributed rigorously to those authors whose expressions were used. For example, in Finland collecting and distributing mechanisms for the compensations are based on the size of platforms. Moreover, according to paragraph 26a of the FCA some of the compensations are distributed also for “common purposes”. See also Committee Report 2002:5, Tekijänoikeustoimikunnan mietintö, Tekijänoikeudet tietoyhteiskunnassa, Ehdotukset tietoyhteiskuntadirektiivin edellyttämiksi lainsäädännön muutoksiksi. Muut tekijänoikeuslain muutosehdotukset, p. 76.

## 12 CONCLUSIONS, ALTERNATIVES AND SUGGESTIONS FOR FUTURE

### 12.1. THE RIGHT TO SCIENCE AND CULTURE AND RIGHTS OF AUTHORS

This dissertation has evaluated possibilities to fulfill the right to science and culture and rights of authors as provided by Article 27 of the UDHR and 15 of the ICESCR. The evaluation focused on use of content on the Internet, which was understood as an open network. In order to accomplish this task, the book first evaluated the right to science and culture as provided by Article 27.1 of the UDHR and Article 15(1) of the ICESCR. As a counter balance to rights of authors, it was concluded that the right to science and culture grants everyone the right to use knowledge and expressions in different forms. As General Comment 21 states, “the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person’s choice, and the access of communities to means of expressions and dissemination.”<sup>521</sup> However, its core area was understood to cover limited amounts of content, which States have particular obligation to secure. Indeed, the Finnish constitutional doctrine does not accept that core areas of fundamental rights could be criminalized.

This thesis continued by evaluating copyright from the viewpoint of individualistic *droit d’auteur* copyright theory and its application as a property right. It was found that the core of copyright as a fundamental right protects the essential economic interests of authors.<sup>522</sup> Applying copyright to the Internet involved certain theoretical challenges. It is easy to accept that expressions are being created and exist, but it is theoretically difficult to evaluate expressions when they are transformed into digital form. Regarding the possibility of administering copyrighted expressions as property, it was concluded that authors have only minimal possibilities to factually administer the use of their content. Thus, it was considered that the right of reproduction and a right to make content available should be seen as legal rights, which stipulate when permission should be asked from an author.<sup>523</sup> However, a right holder must be able to conclude transactions for the functionality of exclusive

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521 General Comment 21 paragraph 16(a).

522 Evaluation of so called moral rights was excluded from the scope of the book.

523 In this respect copyright resembles a certain type of business model embedded to law: an assumption is that expression creation is funded by asking permissions from right holders in certain points defined in copyright law.

rights. If concluding transactions is not possible, a right holder cannot expect to obtain compensation. Based on the right to science and culture, it is difficult to see why prosumers should be denied access to content in cases where concluding transactions is not possible. If authors are unable to obtain compensation and prosumers are denied their right to science and culture there is be a certain type of "maximization of misery," as both the right to science and culture and authors rights would be endangered.

Regarding the applicability of exclusive rights on the Internet, it was found to be impossible for anyone to supervise when a certain piece of content is being reproduced on a certain platform on the Internet in a manner that necessitates permission from a right holder. Consequently, it was suggested that economic rights of right holders could be perceived as rights to communicate content, as the right of reproduction was compared to the basics of communications research. If this were accepted, we would not need to focus on copies forming haphazardly on different platforms of the internet but instead on the persons communicating them.

When the protected core area of the right to science and culture was compared to individualistic copyright theory as a property right, it was difficult to see how exclusive rights could provide a functional solution to secure the right to science and culture and essential economic interests of authors. This is because it is challenging to fulfill the basic material interests of authors through exclusive rights in an author – prosumer-relationship when the right to science and culture is taken into consideration. If a prosumer needs permission from an author in order to enjoy his/her right to science and culture, the right to science and culture is being subordinated to the exclusive rights of authors. This is problematic given that it should not be possible to criminalize (as stealing) core areas of other fundamental rights.<sup>524</sup> Such a situation would be putting a price – even if a reasonable one – on the fundamental rights to science and culture. Even if supremacy of exclusive rights of authors over the right to science and culture were accepted and collected compensations were used to secure essential economic interests of those authors, it would be difficult to consider the criminalization of the activities of prosumers a proportional reaction to a nominal monetary damage to an author (e.g. a 0,07 euro damage corresponding to fee required by a Finnish CMO per downloaded track).<sup>525</sup> Moreover, as fundamental rights protect only certain essential interests,

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524 Making comparisons between copyright and traditional goods as property was also challenging. How could an author be deprived from his/her right "to peacefully enjoy his property" if s/he is completely able to use his/her property despite someone takes a copy of it? It is also difficult to grant fundamental rights protection for authors if their essential economic interests have already been fulfilled or if the author does not have any intention to use a certain piece of work in order to secure his/her economic interests.

525 As explained, the proportionality test of the ECJ aiming to balance or weigh approach to fundamental rights asks first whether limitation of a right by an act of the Community institutions has a legitimate or justified aim or purpose from the standpoint of the objectives of the Treaty on European Union. One should also take into consideration whether the act limiting a fundamental right is indispensable for the achievement of its goal. It is inquired from the viewpoint of human rights if more lenient means would be available for reaching the desired goal. Finally one should examine if the restrictions



from a practical viewpoint a prosumers challenge would be to predetermine whether an author is in need of a fundamental right protection or whether a certain use by an individual prosumer had an impact on the economic position of the author.<sup>526</sup>

It was also difficult see how it would be possible to conclude individual transactions between authors and prosumers for using content on the Internet. Excluding so-called Creative Commons and similar open licenses, it was also difficult to find empirical evidence indicating that individual prosumers and authors were interested in concluding individual transactions with each other regarding use of content on the Internet, even if it were possible.

These findings indicated that exclusive rights do not exist primarily to secure essential economic interests of individual authors nor to enable the use of content by prosumers as provided by the right to science and culture. Consequently, they also support claims arguing that copyright is primarily used by legal persons for business. For this reason, a prosumer's right to science and culture was next compared to the position of corporations from a fundamental right perspective.

## 12.2. THE RIGHT TO SCIENCE AND CULTURE AND CORPORATIONS

As the direct role of authors regarding use of content on the Internet seemed negligible, reciprocal relationship between prosumers and corporations as copyright right holders was evaluated from the viewpoint of fundamental rights, which poses the same basic theoretical challenges as when the relationship between the right to science and culture was compared to rights of authors as natural persons. If it was considered that a prosumer needed permission from a legal person before use, exclusive rights of legal persons would be elevated above the right to science and culture.

The above challenges would be mitigated if licenses with reasonable terms were offered to prosumers. In theory legal persons owning copyrighted content – or in general terms traditional content industry – should strike a deal with prosumers as they traditionally have done with new users. However, in practice, prosumers are often unable to afford the necessary licenses. This creates a particular problem, as it seems as though copyright is not being applied in order to enable use. Instead, it seems that copyright is *de facto* being used by legal persons for business protection and in this respect to *prevent use* of prosumers. This is not only problematic from

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are proportionate and tolerable interference to the human rights in relation to the pursued aim.

526 Rigorous examination whether essential economic interests of certain authors have been endangered due to a certain use should not be considered as an unreasonable requirement. As has been explained, already now one examines in theory whether individual words exceed threshold for copyright protection or whether they have been produced as copies on different platforms.

the viewpoint of the right to science and culture, but also from that of the right to life, liberty and security of person and the right to privacy, as in cases when corporation attempts to use coercive power against prosumers in their homes.

This is particularly relevant given that it is challenging for a legal person to claim fundamental rights protection although P1-1 of the ECHR so formally provides. It is primarily difficult to see that legal persons could fulfill requirements for earning fundamental rights protection as, in principle, fundamental rights protect natural persons. In particular, individualistic *droit d'auteur* copyright theory excludes legal persons from fundamental rights protection. Furthermore, there are no stipulations in international copyright treaties or EU-directives obligating corporations to distribute compensations to those whose essential interests need protection, as the aim of fundamental rights protection postulates. Instead, maximization of profits to owners is often the principal aim for legal persons. It is noteworthy it is not an aim or a value protected by any fundamental rights but instead set in regular law. In fact, obligating legal persons to first pay compensations to those who are in most need would often be in conflict with the aim to maximize profits. Thus, it is generally difficult to add fundamental rights protection aiming to secure certain essential interests ("essential foodstuffs, of essential primary health care, of basic shelter and housing...") to legal persons as right holders.<sup>527</sup> In other words, States are not obligated to secure the "essential interests" of legal persons, only authors and prosumers as natural persons.

Considering the aforementioned argument, it is problematic that the formal reading of law entitles legal persons (including large corporations) to claim damages from natural persons who act as the right to science and culture postulates. The only exception to the exclusion of legal persons from fundamental rights protection is if smaller legal person are considered to enjoy indirect fundamental rights protection through their owners. However, even if prosumers and authors/smaller legal persons were interested in concluding direct transactions with each other, it could be questioned whether it would be proportionate to that authors could criminalize even "stealing" 0,07 euro worth of property when the right to science and culture, right to privacy and right to liberty, life and security of a person of prosumers is taken into consideration. It is also disproportionate, if stealing a candy bar worth 1 euro may at best (in Finland) lead to 6 month imprisonment as a petty theft (in practice a small fine would be given), why should copying a music track lead to 2 years of imprisonment? Provided copyright allows systems containing an element of "rough justice" (i.e. not rigorous sanctions if an author does not obtain every cent) in order to secure rights of authors, applying it should also be possible

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<sup>527</sup> It is possible that legal persons occasionally have other main objectives as profit maximization. For example, legal persons focusing on charity work may have same principal objectives which are embedded to fundamental rights. If this is the case articles of that particular association/corporate charters should in these cases specifically state this objective. Moreover, those legal persons should also *de facto* act accordingly.

when one attempts to secure the rights of prosumers.<sup>528</sup> In short, the problem of the Infosoc Directive (and the laws following it) is that it fails to acknowledge the proportionality principle suggesting that more lenient forms of punishment should be used. Property right may be considered to be the easiest example: why should causing a 0,07 euro damage entitle using police force (using tax payers money) to imprison the person for two years (using tax payers money), thereby preventing the prosumer from working and contributing to a society? If copyright is actually in the first instance used to protect economic interests of legal persons – in words of Gervais for “professionals”<sup>529</sup> to “organize markets for certain types of works of art or the intellect”<sup>530</sup> – it may be asked whether it directly protects property right at all as property of prosumers seems to be completely forgotten. In this situation, the law seems to consider the property of right holders as to be somehow “better”. It is difficult to believe that majority of people – i.e. those who do not receive compensations from content industry – would accept that their property should be of less value or that their right to science and culture, right to privacy and right to liberty, life and security be worthless. However, treating “property right” in this manner corresponds with the amoral aim of corporations to maximize profits as described by Harding, Kohl, Salmon and especially Bakan. To the extent that a formal reading of law is accepted, corporations are able to elevate themselves above fundamental rights in their pursuit of profit and power. From the viewpoint of fundamental rights of prosumers, the situation is concerning: legal protection would not exist for those in most need, i.e., those who in economical sense are the weakest, but for those who are often the strongest, economically. The disproportionality of the situation is highlighted in cases when large corporations demand rigorously respect of copyright, but do not necessarily compensate the initial authors at all.

Consequently, as it pertains to the use of content on the Internet, it would be problematic from the viewpoint of the right to science and culture if legal persons would be able to influence its core area. As states should secure essential interests of authors, but authors and prosumers seem uninterested in concluding individual transactions with each other, alternative mechanisms for securing rights of authors should be considered. Adopting a fundamental right approach would likely force industries to renew their business models (or suffer losses if unable to do so) while protecting the fundamental rights of prosumers. States might also consider using alternative support mechanisms for industries, if considered necessary. Thus, from the viewpoint of fundamental rights, the content industry should be unable to criminalize activities in a society, which belong to a protected core area of a certain fundamental right even if they argue that they are protecting the fundamental rights

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528 See Vilanka 2010 (passim).

529 See Gervais 2010, p. 10 and 14 and Gervais 2006, p. 8.

530 Gervais 2010, p. 15. In the citation Gervais refers especially to economical rights of a right holder.

of their employees, just as other industries are unable to criminalize activities in society by claiming that they protect their employees.

In order to by pass the challenges related to fulfilling the right to science and culture and rights of authors, it was evaluated whether intermediaries could act as agents of prosumers regarding the use of content on the Internet. This was found challenging if the Internet is understood as an open network. Making the claim that an intermediary is liable for use of copyrighted content is problematic because such a claim turns an intermediary into a user, which contradicts its original status as an intermediary. It is also difficult to see how an intermediary could ask permission on behalf of a prosumer before a prosumer has posted a certain piece of content on the Internet. It was then evaluated whether collective licenses could provide a solution as it pertains to the use of content on the Internet by prosumers. However, the collective licenses currently available the use content on the Internet seem to be very narrow (at least in Finland). Collecting management organizations administering collective licenses are also legal persons, which would, in the above mentioned way, make the situation problematic from the viewpoint of fundamental rights in cases where a CMO successfully claims that a prosumer violates its rights.

These findings made it questionable whether fulfilling the aim of copyright and the core area of the right to science and culture regarding use of content on the Internet may be secured through exclusive rights at all. Consequently, alternative mechanisms for securing fundamental rights of prosumers and individual authors could be suggested as it pertains to the use of content on the Internet.

### **12.3. ALTERNATIVE SUGGESTIONS FOR SECURING THE RIGHT TO SCIENCE AND CULTURE AND RIGHTS OF AUTHORS ON THE INTERNET**

#### **12.3.1. MUST A STRICT AND RIGOROUS APPROACH TO COPYRIGHT BE A PREMISE?**

It shall first be briefly evaluated if a rigorous and strict approach to copyright must be a premise that we cannot deviate from. According to Stephen E. *Siwek*, value added by core copyright industries in 2007 in U.S was 904.3 billion dollars whereas value added by total copyright industries in 2007 was 1,583.6 trillion dollars. In 2011, U.S. copyright industries employed over five million workers, who on average are paid significantly more than the average wage in the U.S.<sup>531</sup> Now, would all creativity and existing copyright industry vanish, if an alternative, less rigorous approach to copyright regarding use of content on the internet was applied? Although it may

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531 See Stephen E. *Siwek*, Copyright Industries in the U.S. Economy, The 2011 Report, prepared for the international intellectual property alliance, p. 2 and 4. In general see also Ville *Oksanen*, Five Essays on Copyright in the Digital Era, a doctoral dissertation, Turre publishing 2008, p. 23 ff.

be argued that freer distribution of content may harm the traditional copyright industry,<sup>532</sup> this book finds it unlikely that alternative compensation models for authors would cause unbearable damage to the traditional content industry.

This is because theory does not suggest that a strict approach is necessary, as it is not clear whether or not copyright is beneficial for the society in the first place. In the words of *Posner*: “Unfortunately, economists do not know whether the existing system of intellectual property rights is, or for that matter whether any other system of intellectual property rights would be, a source of net social utility, given the costs of the system and the existence of alternative sources of incentives to create such property.”<sup>533</sup> As presented in chapter 3, there are also theories supporting the benefits of a more open access to content. There are also research results indicating that the industries benefitting from fair use and other limitations are much larger than the copyright-based industries. According to *Rogers* and *Szamosszeg* “industries benefiting from fair use and other limitations and exceptions make a large and growing contribution to the U.S. economy. The fair use economy in 2006 accounted for \$4.5 trillion in revenues and \$2.2 billion in value added, roughly 16.2 percent of U.S. GDP. It employed more than 17 million people and supported a payroll of \$1.2 trillion. It generated \$194 billion in exports and rapid productivity growth.”<sup>534</sup> Moreover, the immense, constantly evolving mass of information freely available on the Internet is empirical proof that incentives to create expressions exist, even when exclusive rights are not been applied.<sup>535</sup> Alternative means but an exclusive right to secure rights of prosumers and authors is not revolutionary from the viewpoint of history of copyright. Indeed, platform fees were introduced because it was considered impossible to administer use of content individually in cases enabling private use for non-commercial purposes; as is the case today when it comes to the relationship of prosumers and authors regarding use of content on the Internet.

When we evaluate the possibility of securing both the rights of prosumers and authors we may see that there is no inherent need for strict copyright approach. These examples were not intended as claims that exclusive rights have no benefits. Instead, they are presented here as arguments proving that creativity exists even when exclusive rights are not applied. For that reason, alternative approaches

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532 For example, according to a study conducted by Lyhty (an organisation for right holders supporting creative work and entrepreneurship) in 2010 already in Finland Internet piracy caused losses amounting to 355 million euro. See Lyhty's [www-pages](http://www-pages.in Finnish at: http://www.kulttuuriuutiset.net/gallupit/piratismiin_tuomat_menetykset_2010) (in Finnish) at: [http://www.kulttuuriuutiset.net/gallupit/piratismiin\\_tuomat\\_menetykset\\_2010](http://www.kulttuuriuutiset.net/gallupit/piratismiin_tuomat_menetykset_2010). It should be noted that Lyhty is a society representing right holders.

533 Richar A. *Posner*, Intellectual Property: The Law and Economics Approach, *Journal of Economic Perspectives* – Volume 19, number 2– Spring 2005, p.59. See also e.g. Pirkko-Liisa *Aro*, Ennakkokäyttöoikeus patentinhaltijan yksinoikeuden rajoituksena. *Vammala* 1972, p. 28 ff and Martti *Castrén*, Vahingonkorvaus immateriaalioikeudessa, silmälläpitäen patentti-, tavaramerkki-, mallioikeus-, tekijänoikeus ja valokuvauksia. *Vammala* 1979, p.7.

534 *Rogers, T., & Szamosszegi, A.* (2007). Fair Use in the U. S. Economy: Economic Contribution of Industries Relying on Fair Use, p. 9.

535 *Benkler*, p. 35 – 41 and *Shaver*, p. 159 - 160 with references. It may also be questioned whether it is rational that a doctrine from the industrial society should prevent using technologies of information age.

to copyright may be suggested when evaluating the possibility of securing the prosumers' right to science and culture and the rights of authors.<sup>536</sup>

From the viewpoint of fundamental rights, this would mean that the legislature secured the right to science and culture for prosumers and the essential economic interests of authors in an alternative manner, but both through exclusive rights. As previously explained, prosumers and authors do not seem to be interested in concluding transactions with each other as fulfilling exclusive rights postulates. On one hand, as legal persons are in principle excluded from fundamental rights protection, the system should enable the use and distribution of content without their interference to secure the right to science and culture. In other words, from a prosumers perspective one should be able to use limited amounts of content as the core area of the right to science and culture postulates. On the other hand, from an authors perspective compensations should be distributed to authors whose essential economic interests have been endangered. In order to maintain individuality in the system, this would mean authors whose content has been used at some point, but who do not fare economically well despite this use. How the systems could look like in practice shall be evaluated next.

### 12.3.2. BASIC PLATFORM FEES AS AN ALTERNATIVE TO EXCLUSIVE RIGHTS?

In chapter 6.4, it was suggested that the Internet could be perceived as a singular platform for copying and communicating content. Hence, to enable the use of content between prosumers and authors, a platform fee system could be employed, covering different platforms used in communication processes on the Internet. In chapter 11 it was argued that this should not be a problem from the viewpoint of fundamental rights if both the rights of prosumers and authors may be secured. On the other hand, as long as prosumers are not able to use content as provided by Article 27.1 of the UDHR, legislature is neglecting its obligation to fulfil the aforementioned right.<sup>537</sup> One problem related to a platform fee system would be defining its extent: what should be considered a relevant platform? It is also difficult to rigorously pinpoint whose content has been used on certain platforms. This is not only problematic from the viewpoint of authors but also from the viewpoint of prosumers' property rights since a platform fee system collects compensations even when the content of

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536 It could be mentioned that also findings supporting compulsory licensing support claims for finding alternative avenues in order to secure rights of prosumers and authors. In this respect see e.g. Huuskonen (passim).

537 Similarly television license fees have been used to enable broadcasting and consequently economics of authors (although they have not been considered directly as fees for copyright holders). Furthermore e.g. in Finland Act on Public Lending Right Compensation Grants and Subsidies (236/1961) secures compensations to writers and translators for the use of libraries ("lainauskorvaus"). Also these mechanisms indicate that alternative solutions in order to secure rights of authors and prosumers could be considered.

right holders was not used by the prosumer. If this is accepted by both parties as “rough justice,” history would suggest that the problem could be tolerable. Although the system would enable only non-commercial use by prosumers, in practice it would most likely be opposed by the content industry as it would cause difficulties in controlling markets. Consequently, it shall next be asked whether government granted licenses could be a solution.

### 12.3.3. GOVERNMENT GRANTED LICENSES

As granting and obtaining individual licenses for use of content on the Internet often seems impossible, one solution could be the governments granting licenses for prosumers. As it would be difficult to maintain a register for each existing expression possibly exceeding a required threshold for copyright protection, the licenses could be blanket licenses for certain content types such as e.g. music, audiovisual products etc. In practice, these licenses would compete with commercial services (such as Spotify, Netflix, etc.) in a similar manner as public broadcasting services compete with commercial broadcasters. They would also compete with collective licenses of CMOs, provided they ever are able to offer wide enough licenses. A government granted license would thus release a prosumer from liability and be a certain type of a compulsory license from an author’s perspective. As has been explained, it is often impossible for authors to conclude individual transactions based on exclusive rights with prosumers. This was one reason why platform fees were suggested. A government -granted license would provide a tool for prosumers to act legally and secure some compensation for authors. While not all prosumers would buy it *there would be the possibility to buy a license*, which is not the case at the moment. Unlike platform fees, government -granted licenses would also take the property of prosumers into consideration as it would not be mandatory to obtain one if a prosumer decided not to use any content. As monthly fees for commercial services are from 5 to 10 euro, a similar amount could allow a prosumer to copy and share, e.g., 36 - 72 music tracks a month as if a cost for a music track would be 0,14 euro.<sup>538</sup> However, the number given number is a gross estimation.<sup>539</sup> This suggestion offers a simple solution, which is not influenced by legal persons, and could be applied to enable use and compensations in a roughly correct manner.<sup>540</sup>

538 As explained, a Finnish CMO offers licenses for 0,07 euros for communicating music on the Internet on certain conditions. The CMO in question represents composers, lyricist, arrangers and music publishers, but not performers and phonogram producers. For that reason the license fee offered in the example was 0,14 euro.

539 As mentioned, according to some sources a popular music service Spotify pays approximately 0,005 euros per download to an author. See Hans Handgraaf, Spotify royalties, available (in English) at: <http://www.spotidj.com/spotifyroyalties.htm>. From this point of view a five euro monthly price should allow much wider use than 36 – 72 tracks for the prosumer.

540 As has been explained, an element of rough justice has already been introduced to copyright and thus applying it in order to secure rights of prosumers should not be a problem.

It should be irrelevant for authors whether compensations are being paid through a commercial service (such as Spotify) or another system. From the fundamental rights viewpoint, collected compensations should be distributed in the first instance to those authors whose essential economical rights have been endangered.<sup>541</sup> Finally, it shall be suggested that a specification to Limited Liability Companies Acts could provide solutions to the situation.

#### 12.3.4. CORPORATIONS AND FUNDAMENTAL RIGHTS

One of the concerns that has arisen in this book has been the fact that legal persons (corporations) attempt to elevate themselves above existing fundamental rights doctrine. This problem could be tackled by an amendment to the limited liability companies acts and other acts regulating legal persons. For example, it could be specified in these acts that the purpose of a company would be generating profits for the owners *but only to extent that it takes into account fundamental rights of others* as specified (e.g.) in the UDHR and ICESCR. Although this should theoretically already be the case, such an amendment would cement the meaning of fundamental rights and prevent companies from arguing that their main – blind – purpose is to maximize profits to owners. Thus, the suggestion would not forbid legal persons from pursuing for profit, but it would rank that objective as a secondary objective behind fundamental rights. This type of amendment would also allow corporations to make decisions that take fundamental rights into consideration. As explained by Bakan, corporations are obligated to follow the main rule of profit maximization even though it is not always necessarily desired by their personnel. Profit as the primary aim of companies has also been criticized in recent economic literature.<sup>542</sup>

### 12.4. SUGGESTION FOR FUTURE RESEARCH

#### 12.4.1. ACKNOWLEDGING PROPERTY RIGHT OF PROSUMERS

One way to bring balance to copyright could be acknowledging prosumers' property rights in relation to the rights of authors. A prosumer's property right could be perceived as a mirror image to the exclusive rights of authors. In practice, this would mean that prosumers (particularly passive end users) should be liberated from paying compensation if they do not receive any content or do not want to

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<sup>541</sup> In theory a problem would be that in the information society we all are authors. Thus in practice compensations should be distributed those authors who *de facto* attempt to maintain themselves through by content creation.

<sup>542</sup> See e.g. Steve Denning, The Origin Of 'The Worlds Dumbest Idea': Milton Friedman, published in Forbes in 26.6.2013, available at: <http://www.forbes.com/sites/stevedenning/2013/06/26/the-origin-of-the-worlds-dumbest-idea-milton-friedman/>.



receive any content. As this is already the case regarding traditional property, why should we not respect a prosumer's negative property right to money they have in their wallets as it pertains to the use of copyrighted content? Or in other words: why is "stealing" from prosumers accepted whereas it is rigorously demanded that exclusive rights of authors should be followed with "zero tolerance"? How this might work in practice is illustrated below.

A prosumer – traditionally in the role of consumer/end user – is always the eventual payer of copyright compensations. This is the case if music is played in restaurants, shops, taxis or any public place. A prosumer pays as an end user even if the prosumer does not hear any music.<sup>543</sup> This is simply because turning of or otherwise not listening to the music does not affect a prosumer's restaurant bill or taxi fare, although the cost is passed on to the prosumers as end users. Moreover, jails and hospitals may be considered a public places where a license is needed in order to play music. Despite this, as a tax payer, a prosumer has to pay for content used in those institutions although s/he would never personally use them. Although this may at first feel as a far-fetched example, one should remember that regarding copyright it has been rigorously evaluated whether rights of authors have been violated or not. As a mirror image to copyright, property of prosumers should be similarly respected. Consequently, the question remains: why should a prosumer pay for products s/he does receive or does not want to receive? Why is the property of prosumers not protected with "zero tolerance" i.e. in a similar manner as it is considered that property or authors should be protected?

Therefore, if a prosumer's negative property right is accepted as a mirror image to author's property right, it may now be asked if someone violates the property rights of a prosumer when a prosumer loses his/her money for products s/he never received or wanted to receive. In fact, from the viewpoint of prosumers' property rights, one could ask whether those who receive compensations from prosumers in these cases are actually stealing from prosumers.<sup>544</sup> In other words, if it is not acceptable to steal from right holders, why should be acceptable to steal from prosumers? It would be unconvincing for copyright holder to argue that the examples are exaggerations as copyright holders themselves demand rigorous respect regarding their property. As previously mentioned, even a singular word may exceed the threshold for protection and it may be rigorously evaluated whether the word is being copied on a certain platform. Keeping this in mind, right holders should also rigorously respect property of prosumers: if one demands others to rigorously honour his/her property s/he should also rigorously honour the property of others.

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<sup>543</sup> Because e.g. the taxi driver has turned off the radio or the prosumer has asked him/her to do so because s/he prefers to be in silence or just dislikes that particular song.

<sup>544</sup> From this point of view one may only ponder the economical damages prosumers have suffered through the times of copyright when they have paid for products they have never received or wanted to receive.

On the other hand if one accepts that principle of proportionality should be taken into consideration, as is suggested in this book, it could be recommended that the property right of prosumers and authors should be taken into consideration more generally when relevant usage situations are defined. This could mean that property right of prosumers would kick in in situations when a prosumer goes to public places where his/her primary interest is not using the content. For example, it is unlikely that a prosumer goes to a jail or uses a taxi in order to listen to music. However, it may be postulated that music plays a role when a prosumer decides goes to a restaurant, night club or watches television/listens to radio (justifying why broadcasters should pay compensations to authors). Thus acknowledging a prosumers property right would bring balance when evaluating relevant usage situations. Consequently, evaluating this topic further may be recommended.

#### 12.4.2. OTHER TOPICS

One of the main concerns presented in this book has been excessive use of power by legal persons in relation to the lives of private individuals. In this respect, it should be noted that digitalization also enables the observing of activities of private individuals in a manner that was not previously possible. For example, the traditional content industry has been keen to observe individuals behaving in a manner not desired by it. Moreover, also other companies providing different types of services (e.g. social media and search engines) on the Internet are widely exploiting the information of individual persons. For example, according to annual report 2012 of the Finnish Security Intelligence Service, “Internet moguls” of the future will have more real time information about individuals than Governments have.<sup>545</sup> Although the accuracy of this statement may be questioned due to recent leaks regarding surveillance of States, particularly the United States, it is clear that a topic for future research should be evaluating the relationship of a right to privacy as provided by Article 12 of the UDHR in relation to possibilities of corporations and States to exploit the personal information of private persons.<sup>546</sup>

Finally, one sidedness and certain inconsistencies in copyright law raise concerns of improper motives behind copyright law.<sup>547</sup> For example, it is not plausible to believe that the majority of people would wittingly allow defining the concept of

<sup>545</sup> See Annual report of the Finnish Security Intelligence Service 2012, p. 4.

<sup>546</sup> One needs not to be a lawyer in order to understand significance of the topic. See e.g. speech of Mikko Hyppönen on TED talks on “How the NSA betrayed the world’s trust – time to act”, available at: [http://www.ted.com/talks/mikko\\_hypponen\\_how\\_the\\_nsa\\_betrayed\\_the\\_world\\_s\\_trust\\_time\\_to\\_act.html?fb\\_action\\_ids=10152048341451660&fb\\_action\\_types=og.likes&fb\\_source=other\\_multiline&action\\_object\\_map=\[248004235352468\]&action\\_type\\_map=\[%22og.likes%22\]&action\\_ref\\_map=\[\]](http://www.ted.com/talks/mikko_hypponen_how_the_nsa_betrayed_the_world_s_trust_time_to_act.html?fb_action_ids=10152048341451660&fb_action_types=og.likes&fb_source=other_multiline&action_object_map=[248004235352468]&action_type_map=[%22og.likes%22]&action_ref_map=[]).

<sup>547</sup> In fact, already maintaining an idea that copyright first and foremost would be for individual authors as natural persons who administer their content is misleading.

property in a manner that does not benefit the majority by considering the majority's property as inferior in comparison to right holder's property. This notion is not merely connected to the position of prosumers and intermediaries. For example, in chapter 4.2.2, products used to circumvent digital rights management systems, which in practice are used by legal persons, may easily exceed the threshold for copyright protection as expressions. However, it may be a crime to create and share them – based on norms often placed in copyright laws. In other words, copyright law may consider it a crime to act as copyright theory postulates, whereas it at the same time may demand that basics of copyright should be rigorously honored. Why should people respect copyright if the legislator does not follow its basic tenets? This is ambiguous, as in both cases the law follows the interests of traditional content industries. Demanding such behavior is coherent with corporate amorality. Indeed, a corporation may reject the very basic tenets it uses if occasionally rejecting them may enable it to maximize profits. This raises concerns of the excessive influence of corporations on the legislative bodies drafting copyright laws. It is unclear to what extent politicians are aware of the content corporations' coercive power extending to every person and every home. For this reason, it may be put under question whether actual decisions regarding copyright have been made elsewhere, rather than in the minds of politicians, where they should have been made. Consequently, these notions raise concerns of the possible effects of corruption as it pertains to legislating processes regarding copyright, which shall consequently be suggested as a topic for future research.<sup>548</sup>

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<sup>548</sup> For example, Lawrence Lessig has connected corruption to copyright. See e.g. Lawrence Lessig, *Institutional Corruption* – Opening Lecture, Cambridge, MA, October 8, 2009, available at: <http://blip.tv/lessig/institutional-corruption-opening-lecture-2731510>. See also Lawrence Lessig, *Free Culture, How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, The Penguin Press 2004 (passim.). Also Hugenholtz has raised the concern of excessive one-sided lobbying. See e.g. Bernt Hugenholtz, *Why the Copyright Directive is Unimportant, and possibly Invalid*. Published in [2000] EIPR 11, p. 501 – 502.

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